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No. 88-

In The

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether the District of Columbia may be held liable under 42 U.S.C. § 1983 because it permits its police officers to use deadly force against suspected felons believed to pose an imminent threat of serious physical harm to themselves or others even when these officers do not see a weapon.

A. Whether the District was entitled to a jury instruction that a police officer, consistently with the Constitution, may use deadly force when he reasonably believes there is an imminent threat of serious physical harm to himself or others, in a case in which the plaintiff claimed that a reasonable training policy should teach police officers not to shoot a suspected felon believed to be reaching for a weapon until they see a weapon.

B. Whether the District failed to preserve its objection to the trial court's unequivocal refusal to give its requested instruction simply because the District, in compliance with the trial court's directive to state only new objections to the instructions after they were given, did not reiterate its objection just before the jury retired to deliberate.

II. Whether the District may be held liable under 42 U.S.C. § 1983 for a police officer's split-second decision to shoot a suspected felon, based on District training policies that neither directed unconstitutional actions nor were deliberately indifferent to the use of unconstitutional deadly force and that, at most, had only a "but for" relationship to the officer's decision to shoot.

PARTIES

In the court of appeals, the parties were Donald R. Parker, Betty Parker, and the District of Columbia.

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The District of Columbia petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The June 17, 1988, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-43a) is reported at 850 F.2d 708. The August 18, 1988, orders denying the petition for rehearing (App. 62a) and the suggestion for rehearing *en banc* (App. 63a) are not reported.

The opinion of the United States District Court for the District of Columbia (App. 44a-60a), issued on January 29, 1987, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1988. App. 61a. On July 18, 1988, the District of Columbia filed a timely petition for rehearing and a suggestion for rehearing *en banc*. On August 18, 1988, the petition for

rehearing was denied, and an equally divided court denied the suggestion for rehearing *en banc*. App. 62a, 63a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .." U.S. Const. Amend. V.

B. Statutory Provision.

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of . . . the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution . . ., shall be liable to the party injured . . .."

STATEMENT OF THE CASE

I. THE UNDERLYING EVENTS.

A. The Decision to Shoot.

This case arises from a split-second decision by a District of Columbia police officer, William Hayes, Jr., to shoot Donald R. Parker, who was wanted on a felony warrant for armed robbery. The shooting occurred after Parker, who had stated that he would accompany Officer Hayes and his partner to the police station, decided to flee. During the chase that ensued, Parker jumped into an automobile being driven by an innocent motorist, shoved her onto the passenger seat, and grabbed the steering wheel. Officer Hayes shot only after attempting unsuccessfully to extricate Parker from the automobile; issuing warnings to Parker to freeze; being

threatened by Parker ("Fuck you. I'm gonna . . . ."); and observing Parker reach for his waistband. Officer Hayes shot Parker in the belief that Parker was reaching for a gun and that his life and that of the would-be kidnap victim were in danger. Parker, who turned out not to be armed, was seriously wounded.

B. Other Events Preceding the Shooting.

Although Officer Hayes and his partner were District police officers, the events just described took place in Prince George's County, Maryland. Officer Hayes and his partner had been dispatched to Maryland to interview Mrs. Parker because the District had been unable to ascertain Parker's whereabouts. The District hoped that Mrs. Parker, who was believed to be estranged from her husband, could supply this information.

It was only after Officer Hayes and his partner had knocked on the door of Mrs. Parker's home and had spoken to her that they unexpectedly encountered Parker himself. Parker invited them inside, and a lengthy conversation ensued. Officer Hayes explained to Parker that he was wanted on an arrest warrant for armed robbery and that his suspected accomplice, one Clarence Johnson, Jr., had been arrested two weeks earlier. Parker, in turn, announced that he had shot Johnson "five or six times" in a dispute over money. Eventually, the officers persuaded (or thought they had persuaded) Parker to go with them voluntarily. When they permitted Parker to go into his bedroom to dress, however, Parker leaped through a window and set in motion the events that culminated in his being shot.

C. Officer Hayes and the Repeat Offender Project.

Officer Hayes and his partner were members of the Repeat Offender Project (ROP), a unit of the District's Metropolitan Police Department (MPD). The ROP had been established some six months before the shooting as part of a concerted effort to identify and apprehend individuals believed to be

committing a disproportionate number of serious crimes in the District. The unit was composed of experienced police officers selected from applicants throughout the Department by the head of the ROP, Inspector Spurlock.

Despite the composition of the ROP, the MPD conducted an intensive week-long training and review program before the unit became operational. This program included instruction on the authority of MPD officers to arrest outside the District and the need to notify local law enforcement agencies whenever an MPD officer reasonably expects to effect an extrajurisdictional arrest so that local law enforcement officers can participate.

II. THE TRIAL.

After the shooting, Parker sued the District of Columbia and the two police officers in the United States District Court for the District of Columbia and contended that his injuries were the result of a variety of constitutional and District-law violations.[1] As the proceedings unfolded, Parker dismissed the officers as defendants and narrowed his claims against the District to two: (1) a common law claim of assault and battery; and (2) a due process claim arising under the Fifth Amendment to the United States Constitution.

In the case of the due process claim, Parker sought to hold the District liable for failing to train its police officers not to use deadly force unless they *see* a weapon in the hands of an adversary. In addition, he urged that the District should be faulted for a number of other alleged training, supervision, and disciplinary deficiencies, including: (1) inadequate "disarmament" or "hand-to-hand" combat training; (2) inadequate training in extrajurisdictional arrest authority; (3) inadequate supervision of Officer Hayes'

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[1] Mrs Parker, who sought damages for loss of consortium, was also a plaintiff.

physical fitness; and (4) its failure to discipline Officer Hayes after the shooting.[2]

A. The Evidence.

1. Training in the Use of Deadly Force and Disarmament Training.

The sharpest factual dispute at trial was over the circumstances in which a police officer may permissibly use deadly force. One of Parker's experts, Roy C. McLaren, articulated a standard for the permissible use of deadly force that was, and is, sharply at odds with constitutional standards and District policy. In addition, Mr. McLaren and another of Parker's experts, Alan Bates, indicated that Officer Hayes should have been able to subdue and disarm Parker and that his training in this respect was inadequate.

Thus, Mr. McLaren testified that "a reasonably careful and prudent training program" should teach police officers not to use deadly force unless they see a weapon in the hands of an adversary. He also testified that Officer Hayes had acted improperly when he fired at Parker because he did not see a gun in Parker's hand. In his view, "You must see a gun in order to make sure that there is an actual threat to yourself or someone else."

By contrast, the District introduced uncontradicted evidence of its use-of-deadly-force policy, a policy that complies with *Tennessee v. Garner*, 471 U.S. 1 (1985), but not with Mr. McLaren's views. The District has long had a policy that permits the use of deadly force only in the most extraordinary of circumstances, *i.e.*, when a police officer reasonably believes that a person poses an imminent threat of serious physical harm to himself or to a third person. The District

[2] As the case has evolved, the alleged training deficiencies have assumed greater importance than the alleged supervisory and disciplinary deficiencies. Accordingly, the District, in this petition, highlights the alleged training deficiencies. It notes, however, that the reasons why liability under 42 U.S.C. § 1983 cannot be imposed for the alleged training deficiencies, enumerated as (1) and (2), apply with equal force to the alleged supervisory and disciplinary deficiencies.

also introduced uncontradicted evidence that this policy was communicated to, and understood by, its police officers including Officer Hayes. Officer Hayes, in turn, admitted that he did not see a weapon, but he also testified that he believed that Parker, who had ignored his warnings, was reaching for a gun and thus posed an imminent threat of serious harm to himself, the driver of the automobile into which Parker had jumped, or both of them. In those circumstances, Officer Hayes understood that District policy permitted him to shoot.

In addition, Mr. McLaren commented on Officer Hayes' deposition testimony that he had received one hour, or "next-to-nothing," in disarmament training, *i.e.*, hand-to-hand combat. According to Mr. McLaren, "assuming that" Officer Hayes "only had two 30-minute sessions in defensive tactics, disarmament tactics, disarming tactics, that would be inadequate." Mr. Bates, in turn, testified that Officer Hayes should have been able to subdue Parker at the time he attempted to extricate Parker from the automobile.

The District, in turn, introduced uncontradicted evidence of its actual training in subduing and disarming dangerous suspects. Inspector Spurlock testified about the District's extensive training, including verbal and physical instruction, in subduing and disarming dangerous suspects. Officer Hayes confirmed his own training in these respects and related several instances in which he had put this training to use by single-handedly subduing dangerous suspects. Here, however, after Parker had slipped from his grasp and appeared to be reaching for a weapon, he understood that he was under no duty to engage in hand-to-hand combat with Parker in an attempt to disarm him. The District, in order to protect the lives of its police officers (as well as the lives of innocent third persons) from unnecessary risks, does not encourage them to engage in hand-to-hand combat with persons who are believed to be armed and dangerous. Instead, a District police officer is instructed to engage in such con-

duct "only as a last resort if for some reason an officer c[an] not use the threat implicit in his service revolver." App. 38a (Williams, J., dissenting).

2. Training in Extrajurisdictional Arrest Authority.

On this aspect of the case, Parker focused his attention on a memorandum prepared by Inspector Spurlock, the head of the ROP, after the week-long ROP training session, and on the testimony of Officer Hayes' partner. The memorandum, which was distributed to ROP officers, summarized the authority of MPD officers to arrest suspects in Maryland and Virginia. One of Parker's experts, Roy C. McLaren, testified that a reasonably intelligent police officer, who read the memorandum, would not understand the scope of his authority to arrest in Maryland. In addition, Officer Hayes' partner testified that he was uncertain of his arrest authority during the time he was in the Parker home.

The District's evidence was largely supplementary. Former Assistant U.S. Attorney (AUSA) Bowman, who assisted in training the ROP, testified that the memorandum could be subject to a number of interpretations, such as permitting an arrest for any felony, or only for felonies and misdemeanors committed in a police officer's presence. In the last instance, however, former AUSA Bowman testified, the memorandum would have been "overly restricted" because a District police officer in Maryland is permitted to arrest for a felony not committed in his presence.

The District also introduced other evidence of the training given ROP officers concerning their extrajurisdictional arrest powers. Inspector Spurlock, who attended the entire week-long ROP training session, testified that there was considerable attention given to extrajurisdictional arrest powers. Former AUSA Bowman agreed and testified that he had personally instructed ROP officers that: (1) they had the power to arrest in Maryland on a felony warrant; (2) "a District of Columbia police officer who was operating in the state of

Maryland had the power to arrest for a felony, even if not committed in his presence, for which he had probable cause;" and (3) a felony warrant issued by a judicial officer was sufficient to establish probable cause.

In addition, both Officer Hayes and his partner testified that they had received instruction concerning extrajurisdictional arrest powers during the week-long ROP training session and before joining the ROP. Furthermore, Officer Hayes testified that he had made several extrajurisdictional arrests in conjunction with local police in the six-month period preceding the Parker shooting. His partner also testified that he had made extrajurisdictional arrests.

Finally, the District introduced uncontradicted evidence that its police officers are instructed to notify local authorities whenever they reasonably expect to make an extrajurisdictional arrest so that local police officers can participate. Here, however, Officer Hayes and his partner did not expect to find Parker at home, based on their information that the Parkers were estranged.[3]

B. Trial Motions and Jury Instructions.

The District moved for a directed verdict on each of Parker's claims, once at the close of his case, and again at the close of all the evidence. In support of the motions, the District urged, *inter alia*, that Officer Hayes' decision to shoot was constitutionally permissible under *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, this Court, in consider-

[3] The evidence also established that the police officers unexpectedly lost radio communication upon arriving at the Parker home and that the Parker telephone had been disconnected, a fact that the officers learned only after they were in the house. Had either the radio or the Parker telephone been available, Officer Hayes and his partner could have called upon local police authorities for assistance. As matters stood, however, these officers, well aware of the potential for domestic violence (their information was that the Parkers were estranged) and/or flight should they simply walk away, undertook to persuade Parker to accompany them to the station voluntarily.

ing the circumstances in which a police officer may use deadly force to prevent the escape of a suspected felon, ruled: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11.[4] Here, Parker, who was on parole for one armed robbery and who was wanted on a warrant for another armed robbery, was shot while he in the process of stealing an automobile and kidnapping its innocent driver and as he appeared to be reaching for a weapon. In addition, the District urged that its training policy on the use of deadly force was not unconstitutionally flawed. The trial court (Joyce Hens Green, J.) denied the motions.

Before the closing arguments and submission of the case to the jury, the District asked for a jury instruction based on *Garner* to ensure that the jury understood its task on the constitutional claim.[5] The instruction was particularly important in view of Parker's expert testimony, which contradicted District policy as well as *Garner*.

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[4] Although Parker's constitutional claim was based on the Due Process Clause of the Fifth Amendment and *Garner* is a decision construing the Fourth Amendment, *Garner* is dispositive in the circumstances of this case. If the District's policy and training on the use of deadly force satisfy *Garner*, they necessarily must satisfy the Due Process Clause. Concomitantly, if Officer Hayes' use of deadly force was reasonable, and therefore permissible under *Garner*, his action cannot be deemed "shocking" under the Due Process Clause.

[5] The instruction the District tendered stated in part:

> . . . [I]t is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm, either to the officer or to others. It is also constitutional for an officer to use deadly force in apprehending a suspect, if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, if, where feasible, some warning has been given.

The trial court declined to give the *Garner* instruction. The District renewed its request following the closing arguments. The closing arguments on behalf of Parker repeatedly emphasized the so-called expert testimony that a training program should teach "that it is not reasonable for a police officer to shoot when he does not see a weapon;" that the District's policy differed from these expert views; and that Officer Hayes "had not seen a gun" before shooting. Those arguments also emphasized Officer Hayes' deposition testimony that he had received "next-to-nothing" in disarmament training. The trial court again refused to give the instruction and remarked that its decision would "make an interesting appeal." The court then instructed the jury. Following those instructions, the court expressly ordered counsel to raise only new objections to them. The District, after initially attempting to reiterate an objection and being cautioned again by the trial court, complied with the court's directive.

III. THE JURY VERDICT.

The jury found in favor of the District on the common law claim of assault and battery and expressly answered "No" to the question whether "Officer Hayes used unreasonable and excessive force" in shooting Parker. The jury also found that "the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law." It awarded Parker $425,046.67 in damages.[6]

IV. THE MOTION FOR JUDGMENT NOV.

The District moved for judgment notwithstanding the verdict on the constitutional claim. In denying the motion, the trial court ruled that there was sufficient evidence to establish that the District had a policy of inadequate training that was deliberately indifferent to the use of excessive

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[6] Mrs. Parker was awarded $1.00 for loss of consortium.

force and that this policy caused Parker's injury. The court explained:

> That is, the jury . . . could have found when examining *only* Officer Hayes' actions that his conduct was not unreasonable given the particular conditions at the time of the shooting, his attested and supported assertions of self defense, and his own lack of training. When assessing the culpability of the District of Columbia, however, the jury could reasonably have found *that the shooting was symptomatic of a city policy that was deliberately indifferent to the use of excessive force, and hence constituted a constitutional violation when judged against the standard for officers properly trained in extrajurisdictional emergencies.* In short, activity that might not seem "shocking" when evaluated against the expectations one might hold for an untrained officer, could well appear "shocking" when evaluated against *a standard of training and safety that the jury could have concluded the municipality reasonably should have provided.*

App. 48a n.5 (emphasis added). There was also, according to the trial court, sufficient evidence of a District policy because Parker had established "that police officers in the ROP unit received 'next to nothing' in disarmament tactics *and* extrajurisdictional arrest procedures." App. 55a (emphasis added).[7]

The court also ruled that the jury could have "reasonably conclude[d] that lack of training was *responsible* for the incident," in that Parker's "experts testified that ROP members received inadequate training in disarmament and extrajurisdictional arrest procedures." App. 59a-60a (emphasis added).

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[7] As noted previously, however (*supra* at 6), Officer Hayes' "next-to-nothing" testimony was directed at "disarmament" training, which he understood to mean training in hand-to-hand combat like that he had received in the military. He certainly did not testify that he received "next-to-nothing" in training about extrajurisdictional arrest procedures.

V. THE APPEAL.

A sharply divided panel affirmed.[8] In brief compass, the majority ruled that the trial court had properly refused to give the *Garner* jury instruction, setting forth the circumstances in which a police officer may, consistently with the Constitution, use deadly force. According to the majority, the instruction need not have been given because the District's policy respecting the use of deadly force, Officer Hayes' understanding of that policy, and his reasons for shooting were not at issue. It also explained that, in any event, the instructions given on the use of excessive force on the common law claim — in which the jury had entered a verdict for the District — were adequate.[9]

The majority, construing Fed. R. Civ. P. 51, also ruled, *sua sponte*, that the District had failed to preserve for appellate review its objection to the denial of the *Garner* instruction. In support of its ruling, the majority explained:

> Rule 51 . . . sets forth the procedure for effectively preserving challenges to jury instructions: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its ver-

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[8] Senior District Judge Myron L. Gordon of the United States District Court for the Eastern District of Wisconsin, sitting by designation, wrote an opinion in which Judge Abner J. Mikva joined. (App. 1a-14a). Judge Stephen F. Williams dissented. (App. 15a-43a).

[9] The court stated (App. 13a (emphasis in original)):

> What the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge. That Officer Hayes may have believed that he was being threatened, and that he did, in fact, issue an oral warning to Mr. Parker to "freeze," does not dispose of this aspect of the appeal. The jury was charged with evaluating the adequacy of the District['s] police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem [the] . . . instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law . . ..

> dict, *stating distinctly the matter objected to and the grounds of the objection.*" . . . The District failed to adhere to Rule 51; it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate.

App. 13a-14a (emphasis supplied by the court).

Finally, the majority ruled that there was sufficient evidence to permit liability to be imposed on the District consistently with *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny. According to the majority, the jury could have credited the evidence that the District had inadequately trained its police officers about extrajurisdictional arrest authority and "disarmament training." App. 9a. The jury could also have concluded that inadequate training in extrajurisdictional arrest authority contributed to a "confused atmosphere" that resulted in the shooting. App. 11a. In addition, it ruled that the District could be held liable because the jury could have concluded that Officer Hayes was not in peak physical condition. Finally, the majority pointed to the District's failure to discipline Officer Hayes after the shooting. App. 9a-l0a.

Judge Williams dissented. In his view, the *Garner* jury instruction should have been given "[i]n view of the drastic gap between the law under *Garner* and McLaren's testimony" and "[t]o prevent the jury from adopting McLaren's standard as its constitutional benchmark . . . ." App. 22a, 21a. Judge Williams also would have ruled that the District preserved this issue for appellate review, given the District's request for the *Garner* instruction, the trial court's considered refusal to give the instruction, and the trial court's directive to raise only new objections to the instructions after they were given. He explained: "I cannot grasp why the court now faults the District for having refrained from a repetition that would have defied the judge's instructions and likely have been contemptuous. To do so is not to preserve orderly trial procedures but to invite their disruption." App. 22a.

Judge Williams noted his agreement with one aspect of the majority opinion, that part of the opinion which indicated that "a municipality should be held liable under § 1983 for unconstitutional acts resulting from inadequate police training only if its training policies reflect "deliberate indifference to those violations . . . ." App. 23a. However, because this Court has yet to rule whether "deliberate indifference" is the standard in cases based on an inadequate training policy, not itself unconstitutional, Judge Williams carefully canvassed the decisions of this Court to demonstrate why this standard is proper. App. 24a-31a. Furthermore, because "it is facts that give words their meaning" (App. 23a), Judge Williams then scrupulously applied the lessons of this Court's decisions to each of alleged deficiencies that had been identified by Parker. App. 33a-43a. By contrast, the majority had combined "distinct liability theories in a vague § 1983 goulash" and had thus "render[ed] the concept of deliberate indifference meaningless and trivialize[d] the causation requirement." App. 33a.

Judge Williams determined that, in some instances, there was no deficiency. In other instances, he determined that any causal link between an alleged training deficiency and the shooting was either non-existent or too attenuated. Thus, for example, Parker's claim that his injuries were caused by inadequate training in extrajurisdictional arrest authority "out-*Palsgrafs Palsgraf*." App. 35a. In the case of Parker's claim based on inadequate "disarmament" training, Judge Williams observed that "[a]t no time did Parker's experts in fact review or analyze the District's training policy, much less assess it as inadequate." App. 38a. He concluded by stating that, even "assum[ing] training errors and a sufficient causal link between them and Parker's injury, there is simply no evidence — from a pattern of excessive constitutional violations or anything else — from which a jury could reasonably infer that [the District's] . . . decisions reflected deliberate indifference to increased risks of such violations." App. 43a.

Subsequently, the District filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The petition for rehearing was denied by a two-to-one vote; and the suggestion for rehearing *en banc* was denied by an evenly divided court. App. 62a, 63a.[10]

REASONS FOR GRANTING THE WRIT

The panel majority in this case made at least three erroneous rulings that warrant review by this Court.

I. The majority erroneously ruled that the trial court properly refused to give a jury instruction defining when a police officer may constitutionally use deadly force. It thereby upheld the jury's verdict even though the verdict may have been based on an expert's opinion — that a police officer may use deadly force *only when he sees a weapon in the hands of an adversary* — considerably more restrictive than the constitutional standard established in *Tennessee v. Garner*, 471 U.S. 1 (1985). The failure to give a *Garner* instruction disabled the jury from assessing the constitutionality of Officer Hayes' action and the District's policy on when deadly force may be used.

Review of this ruling is necessary to ensure that municipalities are not found liable under *Monell* for training policies and police actions that *comply* with the Constitution. Review is also necessary to ensure that police officers are not required to risk their lives unnecessarily. To avoid liability under 42 U.S.C. § 1983, the District should not be required to train its police officers to use deadly force only if they *see* a weapon in a suspect's hands. Such a policy would needlessly permit criminals to kill or to inflict serious bodily injury on police officers.

II. The majority erred in ruling that the District did not preserve for appellate review its objection to the denial of

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[10] The court of appeals split five-to-five on the suggestion for rehearing *en banc*; Judge Douglas H. Ginsburg did not participate. App. 63a.

the *Garner* instruction. Here, the District proposed, and the trial court rejected, an instruction based on *Garner*. Furthermore, the trial court expressly indicated that the point was preserved for appeal, and, after instructing the jury, directed the parties to raise only new objections to the instructions. The ruling of the majority that the District did not preserve for review its request for the *Garner* instruction is wrong and is squarely at odds with numerous decisions of other U. S. Courts of Appeals. Review is necessary to ensure a sensible and uniform construction of Fed. R. Civ. P. 51.

III. In its rulings on the claims of inadequate training, the majority eviscerated the limits on governmental liability established by this Court. Thus, although the majority seemed to recognize that *Monell* permits liability to be imposed only when a government policy or custom is the "moving force" of the constitutional injury asserted, the majority found the District liable based on what, at best, was a "but for" relationship between the asserted deficiencies in its training of police officers and the shooting here. Furthermore, *Monell* requires that a constitutional injury be fairly attributable to a municipality. The majority, although purporting to hold that *Monell* requires that a training policy, not itself unconstitutional, be deliberately indifferent to constitutional violations, did not, in fact, require any such evidence. Instead, the alleged defects in training it identified deal with matters that create little or no risk that deadly force will be used in violation of the Constitution.

These aspects of the majority's decision must be reviewed to ensure that the limitations on governmental liability established in, or flowing from, *Monell* are not rendered illusory in practice. The ruling below is inconsistent with this Court's determination that "but for" causation cannot be a "moving force." It is also inconsistent with *Monell's* central meaning that a municipality may be held responsible under 42 U.S.C. § 1983 only when it may fairly be said that

the municipality has made a conscious choice to adopt a policy or custom that causes unconstitutional harm.[11]

Review is also appropriate because this Court has not definitively established the strength of the causal connection required by *Monell*; and the majority's decision finding a sufficient causal connection here squarely conflicts with a decision of the Sixth Circuit. Furthermore, assuming, *arguendo*, that a municipality may be held liable under *Monell* for injuries caused by an allegedly inadequate training policy not itself unconstitutional, this Court has not yet adopted a standard or established guidelines setting forth the circumstances in which a municipality may fairly be held responsible for a constitutional tort caused by such a policy.[12]

This case presents an appropriate vehicle for this Court to begin to resolve these important questions in the context of law enforcement training policies. The lower courts have struggled for years, with varying results, to define the contours of *Monell* in this context. Guidance from this Court is needed.

* * * *

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[11] The issue whether a municipality may ever be held liable for an allegedly inadequate training policy, not itself unconstitutional, is pending in this Court in *Canton, Ohio v. Harris*, No. 86-1088 (argued on Nov. 8, 1988). See *infra* note 22.

[12] In the absence of a definitive ruling, numerous courts have held that a municipality may be held liable only upon proof of a municipal policy or established custom deliberately indifferent to constitutional violations. *See, e.g., Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2d Cir. 1986) ("deliberate indifference"), *cert. denied*, 107 S. Ct. 1384 (1987); *Hays v. Jefferson County*, 668 F.2d 869 874 (6th Cir.) (training must be so reckless or grossly negligent that police misconduct almost inevitable), *cert. denied*, 459 U.S. 833 (1982); *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985) ("deliberate indifference"established by training so grossly negligent "that police misconduct inevitably occurs").

I. WHEN A JURY MUST DECIDE WHETHER A GOVERNMENT'S POLICY IS UNCONSTITUTIONAL AND WHETHER A CONSTITUTIONAL TORT HAS BEEN COMMITTED, THE JURY SHOULD BE TOLD WHAT THE CONSTITUTIONAL STANDARD IS.

The majority ruled that the District was not entitled to a jury instruction setting forth the circumstances in which it is constitutionally reasonable for a police officer to use deadly force. The majority did so, even though the failure to give such an instruction permitted the jury to find the District liable for its training on the use of deadly force under a standard, articulated by one of Parker's experts, that is sharply at odds with constitutional standards.

The majority, in upholding the denial of the *Garner* instruction, nowhere even acknowledged the disparity between the views of Parker's expert, on the one hand, and the constitutional standard established by *Garner* and the District's policy, on the other. It failed to do so, even though the expert's views and the District's evidence of its policy produced the sharpest factual dispute at trial. Instead, inexplicably the majority held that the instruction need not have been given because the District's official policy, Officer Hayes' understanding of that policy, and his reasons for shooting were not at issue in this case. It also explained that, in any event, the instructions given on the use of excessive force on the common law claim were adequate.

The majority's reasoning is wrong. First, the constitutionality of the District's official policy and its training governing the use of deadly force *were* presented to the jury, by Parker's expert, by the District's witnesses, and by the closing arguments. Second, the jury was asked to decide whether Parker's injury was a constitutional tort, *i.e.*, whether Officer Hayes' use of deadly force was or was not constitutional in the circumstances. Despite its task on the constitutional claim, however, the jury was not instructed on the *constitutional* standard governing the use of deadly force. As a result, the jury could not intelligently assess the constitu-

tionality of the District's policy or of Officer Hayes' decision to shoot. Also as a result, the jury was permitted to impose liability based on the policy deemed "reasonable" by one of Parker's experts, a policy far more restrictive than the constitutional standard set forth in *Garner,* which the District's policy satisfies.[13] *Compare Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (police officer may shoot fleeing bank robbery suspect who appears to be armed).

The fact that the jury was instructed on the circumstances that permit the use of deadly force under the common law—in connection with the common law count of assault and battery—does not cure the deficiency in the instructions on the constitutional count. On the contrary, if the jury had been properly instructed on the circumstances in which the Constitution permits the use of deadly force—which are virtually the same as those which permit deadly force to be used under the District's common law standard about which it was instructed—there is every reason to believe that the jury, which rendered a verdict in favor of the District on the common law claim, would also have found in favor of the District on the constitutional claim.[14]

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[13] This expert's opinion is also sharply at odds with the law in numerous jurisdictions, and with police department policies throughout the country, as described by this Court with approval in *Garner*. *See Garner, supra,* 471 U.S. at 15, 17-19.

[14] The jury instructions and verdict form quite plainly distinguished between the common law count and the constitutional count. As a result, the deficiency in the instructions on the constitutional count could not be remedied by a proper instruction on the common law count. On the contrary, the instruction on common law count and the absence of a comparable instruction on the constitutional count may have lead the jury to infer that two different rules applied to the facts.

On the common law count, the jury was told:

> A police officer is entitled to use reasonable force in defense of himself or in defense of another. However, a police officer is not entitled to use unreasonable or excessive force. The use of excessive force that is, *any greater force than the police officer had reasonable grounds to believe and actually did believe to be necessary* under the circumstances constitutes an assault and battery.

(Emphasis added). By contrast, no comparable instruction delineating the circumstances in which force would be deemed reasonable, and thus a training policy permissible, was given on the constitutional count.

The decision of the majority that the *Garner* instruction need not have been given is at odds with the virtually unanimous judgment of this Court in *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985). In *Tuttle,* seven Justices agreed that, when jury instructions permit liability to be imposed on a constitutionally untenable theory, reversal is required even if the evidence might otherwise support a finding of liability by a properly instructed jury. *Id.* at 821-22 (plurality op.); *id.* at 830-33 (Brennan, J., concurring).

II. WHEN A TRIAL COURT CLEARLY REFUSES TO GIVE A JURY INSTRUCTION AND STATES THAT THE ISSUE IS PRESERVED FOR REVIEW, IT MAY BE RAISED ON APPEAL EVEN IF A PARTY, IN COMPLIANCE WITH THE TRIAL COURT'S DIRECTIVE, DOES NOT LODGE A REPETITIVE OBJECTION AFTER THE INSTRUCTIONS ARE GIVEN.

The District tendered a *Garner* instruction and specifically renewed its request for this instruction immediately after closing arguments to the jury and just before it was instructed. In refusing to give this instruction, not once but twice, the trial court plainly made a considered and final judgment that the *Garner* instruction should not be given. Indeed, the court even remarked that its decision not to give the instruction would "make an interesting appeal." Finally, after the instructions were given, the court expressly ordered counsel to raise only new objections to them.

The *sua sponte* ruling of the majority that the District nevertheless failed to preserve its objection is wrong. The purpose of Fed. R. Civ. P. 51 is to give adequate notice to the trial court of deficiencies in the jury instructions so that these deficiencies may be remedied in a timely fashion—before the jury retires to deliberate. Here, the District proffered its instruction not once but twice, and the trial court, which had already been apprised of the District's legal theory

in its two motions for a directed verdict, expressly indicated that its denial of the *Garner* instruction was preserved for review. In these circumstances, Rule 51 should not be interpreted as requiring counsel to ignore a trial court's express directive to raise only new objections to the jury instructions after they have been given. The majority's decision that this issue was not preserved will require pointless formalistic objections; waste the time of the trial courts; and generate numerous disputes in the appellate courts over the sufficiency of objections to jury instructions.[15]

Review of the majority's ruling that the District did not comply with Rule 51 is necessary, not only because it is wrong, but also because it conflicts with numerous other decisions by the U.S. Courts of Appeals. Those decisions hold that, when a trial court clearly rejects a proffered jury instruction, further objection is unnecessary to preserve the point for appeal. *See, e.g., Cohen v. Franchard Corp.*, 478 F.2d 115 (2d Cir.) (no need for objection after jury charge where court was fully informed of party's contention in advance of charge and it was clear that further efforts to persuade the court would have been unavailing), *cert. denied*, 414 U.S. 857 (1973); *Lang v. Texas & P. Ry*, 624 F.2d 1275, 1279 (5th Cir. 1980) (Under Rule 51, "the failure to object may be disregarded if the party's position has previously been made clear to the court and it is plain that a further objection would have been unavailing"); *Goostree v. Tennessee*, 796 F.2d 854, 862-63 n.3 (6th Cir. 1986) (when trial court specifically refused to include proposed instruction, party may assign refusal as error on appeal even if party did not object to instructions as given), *cert. denied*, 107 S. Ct. 1374 (1987); *Cameo Convalescent Center v. Senn*, 738

[15] Contrary to the suggestion in the majority opinion (App. 14a), nothing in *St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), supports its ruling. In *Praprotnik*, the complaining party, in contrast to the District, "*agree[d]*, both in its motions and proposed instructions, with its opponent's view of the law." *Id.* at 946, (Stevens, J., dissenting) (emphasis in original). Even then, this Court reviewed the assigned error.

F.2d 836, 842 (7th Cir. 1984) (written submission objecting to trial court's refusal to give jury instruction, filed after conference on instructions, sufficient to preserve issue for appeal), *cert. denied*, 469 U.S. 1106 (1985); *Meitz v. Garrison*, 413 F.2d 895 (8th Cir. 1969) (when party twice objected to jury instruction at conclusion of the evidence and set forth the grounds of objection, review is proper even though party did not object to instructions after they were given before jury retired); *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987) (where party has proposed alternative instruction and court is fully aware that party does not agree with instructions as given, no need to object specifically to instructions after they are given).[16] *Compare Dunn v. St. Louis San Francisco Ry*, 370 F.2d 681, 683-84 (10th Cir. 1966) (requiring literal compliance with Rule 51 irrespective of circumstances). *See generally*, Wright, Miller & Elliott, Federal Practice and Procedure (Civil) 2d, §§ 2553, 2554 (1971 & 1987 Supp.) (discussing with approval approach taken by majority of U.S. Courts of Appeals).

III. NO DISTRICT TRAINING POLICY DELIBERATELY INDIFFERENT TO THE UNCONSTITUTIONAL USE OF DEADLY FORCE WAS THE MOVING FORCE OF PARKER'S INJURIES.

This Court has made clear that a municipality may not be held liable under 42 U.S.C. § 1983 "unless action pursuant to official municipal policy of some nature [has] caused a constitutional tort." *Monell, supra*, 436 U.S. at 691. In *Monell*, for example, a written municipal policy expressly directed the constitutional violation so that the necessary causal connection and municipal responsibility were easily established. By contrast, in cases in which there is no such express directive, establishing a causal link between the

[16] Indeed, the ruling of the majority that the District did not preserve its objection to the trial court's refusal to give the *Garner*-based instruction conflicts with a previous decision of that court in *Stewart v. Ford Motor Co.*, 553 F.2d 130 (D.C. Cir. 1977).

injury and the municipal policy, and attributing the injury to a decision of the municipality, are more difficult. However, the challenged policy must be "the moving force of the constitutional violation," and "but for causation . . . is never a sufficient condition for liability." *Oklahoma City v. Tuttle, supra*, 471 U.S. at 820 (plurality op.), quoting *Monell, supra*, 436 U.S. at 694; *id.* at 833 n.9 (Brennan, J., concurring). Furthermore, to establish municipal responsibility for the injury, the challenged policy must, at the very least, be deliberately indifferent to a substantial risk that a constitutional violation will occur.

In this case, the majority acknowledged this Court's decisions. It also purported to apply to the inadequate training claims (1) this Court's requirement that there be a causal connection and (2) the standard of "deliberate indifference" that has been adopted by the vast majority of the U. S. Courts of Appeals. Nevertheless, the majority ignored this Court's determination that a "but for" causal relationship between a municipal policy and injury is insufficient; and it failed to appreciate that the "deliberate indifference" standard, if it may be applied at all, must relate to a substantial risk of a constitutional tort.[17]

Significantly, the majority identified nothing infirm about the District's policy on the use of deadly force, its training in this respect, or Officer Hayes' understanding of this policy. On the contrary, the majority ruled that evidence respecting those matters was irrelevant—even though the jury was asked to decide whether the District's training policy in this respect caused a constitutional violation.

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[17] Thus, the majority opinion speaks of "deliberate indifference manifest by systemic and grossly inadequate training, discipline, and supervision" (App. 6a); "deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided there is a causal connection between such inadequacies and *the risk of harm to others*" (App. 7a (emphasis added)); and "deliberate indifference to adequate training, supervision and discipline." App. 8a.

Instead, the majority upheld the verdict against the District by according an unrealistic measure of deference to the jury and by ruling that the jury could have found deficiencies in other supposed training, supervision, and disciplinary policies. Thus, for example, the majority ruled that the jury could have found that the evidence established that the District had inadequately trained its police officers about extrajurisdictional arrest authority and "disarmament training." App. at 9a.

The majority's analysis is wrong for several reasons. First, because the jury was not instructed on the issue of when deadly force may be used consistently with the Constitution, it is utterly hypothetical to suggest that the so-called deficiencies pinpointed by the majority were those on which the jury relied. On the contrary, here, as in *Tuttle*, "[t]here is no way to determine on which theory the jury relied." *Oklahoma City v. Tuttle*, 471 U.S. at 827 (Brennan, J., concurring). *Accord id.* at 821-22 (plurality op.). Furthermore, the majority failed to measure even the hypothetical jury findings of training, supervision, and disciplinary inadequacies against the causation requirement of *Monell* or the "deliberate indifference" standard. As a result, the majority has effectively read those limitations on liability out of the law.

A. Extrajurisdictional Arrest Authority.

The majority, relying on one of Parker's experts, reasoned that the District may be held liable for inadequately instructing its police officers about when they may make an arrest outside the District.[18] Even if there was inadequate

[18] As noted, this expert faulted a single memorandum prepared after the week-long ROP training session. In its opinion, the majority focused on this memorandum and ignored other evidence that members of the ROP were expressly instructed that they may execute a District felony warrant in Maryland. Furthermore, assuming, *arguendo*, that there was a gap in training on extrajurisdictional arrest authority, its significance is much less than that the majority gave it because District police officers are instructed to contact local law enforcement authorities whenever they reasonably expect to make an arrest outside the District.

training in this respect, however, the District may not be held liable in this case consistently with *Monell*.

For one thing, training in extrajurisdictional arrest authority has nothing to do with the use of deadly force. As a result, the deficiency identified by the majority cannot provide a basis for inferring that the District was deliberately indifferent to the unconstitutional use of deadly force, *i.e.*, that the deficiency, if there was one, was almost certain to cause the unconstitutional use of deadly force.

In addition, any deficient training in this respect cannot, as a matter of law, be deemed the moving force behind Parker's injuries. At worst, any deficiency simply caused Officer Hayes and his partner to refrain from arresting Parker in his home. It did not cause Officer Hayes to shoot Parker. On the contrary, Parker's decisions to flee and to attempt to hijack an innocent motorist's automobile broke any causal connection between any deficiency in training about extrajurisdictional arrest authority and Officer Hayes' decision to shoot.

The majority's ruling that there was a legally sufficient causal connection between training in arrest authority and Parker's injuries squarely conflicts with *Cameron v. City of Pontiac, Michigan*, 813 F.2d 782 (6th Cir. 1987). In *Cameron*, the court ruled that a felony suspect's decision to flee—there, in response to the police shooting at him—broke any causal connection between the shots preceding the suspect's flight and his death, which occurred when he ran onto a freeway and was struck by an automobile.

The causal connection here is even more attenuated. It cannot be said that Officer Hayes' failure to arrest Parker caused the injuries he sustained when he was shot. There is no affirmative link between the failure to arrest Parker and his injuries, in view of Parker's independent decisions to flee; to attempt to steal an automobile of an innocent passerby with the driver inside; and to respond to Officer Hayes' warning to "freeze" by reaching for his

waistband.[19] *See also Martinez v. California*, 444 U.S. 277, 280, 285 (1980)(In ruling that a murder committed by an unreasonably dangerous parolee was not cognizable under 42 U.S.C. § 1983, this Court explained that the murder was "too remote a consequence" of the decision to release the parolee, even if mistaken and "reckless.").

The majority found irrelevant the District's policy and training on the use of deadly force, Officer Hayes' understanding of this policy, and the circumstances that precipitated his decision to shoot. Indeed, the majority described as "background" the events immediately preceding the shooting, including Parker's choice of a felonious escape route and Officer Hayes' testimony that he believed that Parker was reaching for a gun. App. 3a. As a result, the majority has ruled that the District may be held liable under *Monell* for a police officer's decision to shoot (1) whenever hindsight reveals that imperfections in the District's training, on matters having nothing to do with when deadly force may be used, contributed to a "confused atmosphere;" (2) this "confused atmosphere" preceded an altercation between a police officer and a citizen; and (3) a police officer's split-second judgment turns out to be erroneous. App. 11a. This does not come close to satisfying *Monell*, and it defies common sense.

B. Disarmament Training.

The majority opinion also points to unspecified evidence of deficiencies in "disarmament training" and states, without explanation, that "it too illustrates deliberate indifference to *adequate training*." App. 9a (emphasis added). Its judgment is flawed in several respects. First, the evidence that was introduced by Parker does not support even its conclusion that the District's training was inadequate. Parker's

[19] At the moment that Parker attempted to hijack the automobile of the passing motorist, there can be no question that Officer Hayes knew that he had the power to arrest because he had probable cause to believe that Parker was in the process of committing felonies.

expert, Mr. McLaren, merely testified hypothetically: "assuming that [Officer Hayes] only had two 30-minute sessions in defensive tactics, disarmament tactics, disarming tactics, that would be inadequate." Mr. Bates, in turn, simply testified that Officer Hayes should have been able to subdue Parker at the outset of the altercation. Furthermore, the characterization of a training program as "inadequate" cannot support an inference of "deliberate indifference."[20] Finally, there was uncontradicted evidence that all MPD officers, including Officer Hayes, received extensive training in disarming tactics. See App. 37a-39a. This evidence not only rendered Mr. McLaren's hypothetical opinion irrelevant, but also established that there was no basis for inferring that the District's training in disarming tactics was deliberately indifferent to the unconstitutional use of deadly force. Accordingly, contrary to *Tuttle*, the majority permitted the District to be held liable solely because of the conduct of a single police officer on a single occasion (here, Officer Hayes' failure to subdue Parker). *See Oklahoma City v. Tuttle, supra*, 471 U.S. at 823-24 (plurality op.); *id.* at 833 (Brennan, J., concurring).

We add only two other observations. First, even if additional disarmament training may have made Officer Hayes significantly more likely to try to disarm Parker physically at the moment he believed that Parker was reaching for a gun, the failure to provide such training did not cause a violation of Parker's constitutional rights. Under *Garner*, if Officer Hayes reasonably believed that Parker posed an imminent threat of serious harm to himself or to the driver of the automobile, he was entitled to shoot as he did. This is so,

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[20] At worst, a merely "inadequate" training program may permit an inference of negligence. In *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), however, this Court squarely held that "the Due Process Clause is simply not implicated by a *negligent* act . . . causing unintended loss of or injury to life, liberty, or property." *Daniels, supra*, 474 U.S. at 328 (emphasis in original).

even if there was also a possibility that Officer Hayes might have been able to subdue Parker by engaging in hand-to-hand combat.

Second, to the extent that the majority opinion requires the District (and any other government entity subject to liability for constitutional violations) to train its law enforcement officers that they may not use deadly force against a suspect who is believed to pose an imminent threat to their lives unless they attempt first to disarm the suspect by using physical force, the opinion exposes law enforcement officers (and innocent bystanders) to serious and unwarranted risks.[21] Here, for example, Parker admittedly knew that Officer Hayes was armed. As a result, any effort by Officer Hayes to disarm Parker by engaging in hand-to-hand combat could have caused serious harm not only to Officer Hayes but also to the innocent motorist. In such a struggle, Parker may have been able to secure and discharge Officer Hayes' service revolver, or it could have been discharged accidentally. Furthermore, had Parker himself been armed, as Officer Hayes believed, the risk of harm would have been multiplied.

Given these risks, no jurisdiction should be required, as a condition of avoiding section 1983 liability, to train its law enforcement officers to engage in hand-to-hand combat whenever they reasonably believe that a person poses a serious and imminent threat to themselves or to a third person. Training that may be appropriate for military personnel engaged in warfare should not be required of law enforcement officers engaged in the task of apprehending suspected felons. Nor should any police officer be forced to engage

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[21] As this Court recognized in *Garner*, "a hand-to-hand struggle" between a criminal suspect and a police officer "necessarily" puts "at risk" "the safety of the arresting officer . . .." 471 U. S. at 14-15.

in hand-to-hand combat when a felony suspect ignores his lawful authority and appears to reach for a weapon.

C. Other Flaws.

The majority also pointed to Officer Hayes' physical condition and the District's failure to discipline him for the shooting. In its view, his physical condition may have disabled him from subduing Parker at the outset of the automobile altercation. However, even if Officer Hayes was not physically fit in every respect (but see App. 35a-37a), this flaw cannot establish liability under *Monell*. Evidence that one of the two police officers assigned to interview Mrs. Parker may not have been in peak physical condition does not establish a policy of any kind, much less a policy of deliberate indifference to the unconstitutional use of deadly force. Furthermore, even if Officer Hayes was in poor physical condition, and thus unable to subdue Parker at the outset of the altercation, his physical condition was not the moving force of Parker's injury—it did not impel Officer Hayes to shoot. Finally, the failure to discipline a single police officer for a single act cannot establish a *Monell* violation, particularly where, as here, the jury found that Officer Hayes did not use excessive or unreasonable force.

CONCLUSION

This Court should grant the petition for a writ of certiorari.[22]

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[22] This Court has already granted certiorari in *Canton, Ohio v. Harris*, No. 86-1088 (argued Nov. 8, 1988), and in *Deshaney v. Winnebago County Dept. of Social Services*, No. 87-154 (argued Nov. 2, 1988). *Harris* presents the issue whether *Monell* liability can ever be imposed for an allegedly inadequate training policy not itself unconstitutional—in the context of a failure to render medical care to an arrestee. *Deshaney*, in turn, presents the question of the standard of liability necessary to establish a due process violation in the context of an allegedly reckless failure of a county welfare agency to protect a child from parental abuse.

If, in *Harris*, this Court should rule that an inadequate training policy, not itself unconstitutional, can never permit liability under 42 U.S.C.

[Footnote continued on next page]

Respectfully submitted,

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[Footnote continued from previous page]
§ 1983, the judgment here could be vacated and the case remanded for reconsideration in light of that ruling. This Court could reasonably vacate and remand even though this petition presents two independent issues that warrant plenary review—the failure to give the *Garner* instruction and the ruling on Fed. R. Civ. P. 51.

If, on the other hand, this Court should decide that an inadequate training policy, not itself unconstitutional, may permit municipal liability in some circumstances, the decision here would still warrant review. *Harris and DeShaney* do not raise *Garner* or Rule 51 issues, and both cases involve liability in the context of protective obligations that a municipality may owe to its citizens. By contrast, this case involves the issue whether police training policies create unacceptable risks of constitutional violations. This case thus presents this Court with the opportunity to clarify the meaning of *Monell* and its progeny in the context of recurring and important law enforcement activity.

88-810

Supreme Court, U.S.
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CLERK

No. 88-

In The

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER, *et al.*,
Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7039

DONALD R. PARKER, *et al.*

v.

DISTRICT OF COLUMBIA, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-03382)

Argued November 16, 1987

Decided June 17, 1988

Donna M. Murasky, Assistant Corporation Counsel, D.C., with whom *Frederick D. Cooke, Jr.*, Acting Corporation Counsel, D.C., and *Charles L. Reischel*, Deputy Corporation Counsel, D.C. were on the brief for appellant.

William W. Taylor, III, with whom *Roger E. Zuckerman* and *Christine Nicholson* were on the brief for appel-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

lees. *Michael R. Smith* also entered an appearance for appellees.

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON, **Senior District Judge.*

Opinion for the Court filed by *Senior District Judge* GORDON.

Dissenting Opinion filed by *Circuit Judge* WILLIAMS.

GORDON, Senior District Judge: Don R. Parker sustained serious injuries after being shot by an officer of the District of Columbia metropolitan police department Repeat Offenders Project [ROP]. This is an appeal from a judgment based upon a jury verdict that awarded Mr. Parker $425,046.67 in damages and nominal loss of consortium damages to his wife, Betty. The Parkers sued the District of Columbia and the ROP officers involved; they alleged state law assault and battery and violations of 42 U.S.C. § 1983 arising out the District's failure adequately to train, discipline and supervise its ROP officers in matters of extrajurisdictional arrest and disarmament. Prior to trial, the Parkers dropped their claims against the individual officers and proceeded only against the District.

At the close of all the evidence in the trial, the court denied the District's motion for a directed verdict. The case went to the jury, which found in favor of the District on the state law claims, but against the District with respect to the section 1983 claim. The District moved for judgment notwithstanding the verdict, but the court denied this motion. The District now challenges the court's ruling on the motion for judgment n.o.v. and aspects of the charge tendered to the jury. For the reasons set forth below, we affirm.

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* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

I. Background

This case is the result of confusion and a series of mistakes leading to tragic consequences. On the morning of November 15, 1982, two ROP officers, William Hayes and Ronnie Motley, set out to locate Don Parker, for whom an armed robbery felony warrant was outstanding.

To begin their search, the officers traveled to suburban Maryland in plain clothes and in an unmarked car, a 1974 Pontiac station wagon. There they intended to interview Betty Parker. The officers did not bring the Parker warrant because they mistakenly assumed that their arrest authority in Maryland was curtailed and that Don and Betty Parker did not live togther. When they arrived at the Parker address, they unsuccessfully attempted to contact their dispatcher by radio. Unfortunately, the officers were parked in a radio "dead spot," and they could not communicate with the ROP.

When the officers went to the door and identified themselves to Ms. Parker, she brought Mr. Parker to the door. Mr. Parker invited the officers into the house. The officers described the purpose of their visit and requested that Mr. Parker voluntarily accompany them to the D.C. police department. Mr. Parker denied any wrongdoing; indeed, the armed robbery charge was eventually dropped. Mr. Parker also refused to leave with the two men who were not in possession of a warrant. Because his phone was disconnected, Mr. Parker asked the officers to radio either the local police or their ROP supervisors regarding the warrant, but the officers' dead radio barred that procedure. Finally, Mr. Parker ostensibly agreed to accompany the officers but asked for the opportunity to change his clothes. Officers Hayes and Motley granted this request; Mr. Parker went into his bedroom and escaped through the window into the neighboring woods.

Once the officers realized that they had been duped, they jumped into their station wagon and chased Mr. Parker around the surrounding neighborhood. To escape,

Mr. Parker commandeered a late model Volvo, one that had just careened into the rear end of the officers wagon. Officer Hayes rushed out of his vehicle and tried to extricate Mr. Parker from the Volvo, but he was unable to accomplish this task. Operating under the erroneous assumption that Mr. Parker was threatening the driver of the car and that he was armed, Officer Hayes yelled: "Freeze Parker, don't do it." Transcript at 200. Mr. Parker continued to turn towards Officer Hayes, and the officer shot at him four times. Don Parker was hit twice, once in the abdomen and once in the spine, causing serious and permanent injury.

II. Analysis

A. *Standard of Review*

In reviewing Judge Green's ruling on judgment n.o.v., we apply the standard applied when reviewing directed verdict rulings. *See Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). A directed verdict or judgment n.o.v. is inappropriate unless there is only one reasonable conclusion to be drawn from the evidence and that conclusion is inconsistent with the verdict rendered. *Morgan v. District of Columbia*, 824 F.2d 1049, 1056 (D.C. Cir. 1987). Our task on review is not to weigh or reconsider the evidence.

> [W]e are required to evaluate the evidence under the presumption that the jury resolved all factual disputes in favor of the prevailing party. Moreover, we must give the advantage of every fair and reasonable inference to the prevailing party. Finally, we may not assess the credibility of the witnesses; that function is reserved exclusively for the jury. Our function is limited to cerifying "only that fair-minded jurors could reach the verdict rendered."

Id. (quoting *Grogan v. General Maintenance Service Co.*, 763 F.2d 444, 447 (D.C. Cir. 1985)).

Despite strong factual underpinnings and clear precedent to the contrary, the District is, in effect, urging us to impose a less onerous standard for overturning jury awards in municipal liability cases under 42 U.S.C. § 1983. As the *Morgan* opinion illustrates with eloquent detail, jury awards are always "given the utmost of deference and respect." *Id.* at 1056. There is no authority to veer from this standard in cases involving awards against municipalities; we decline to adopt the District's implied suggestion to do so.

Our colleague's dissent is primarily based on his own interpretation of the facts, which is contrary to that of the jury. In our view, the dissent is seriously flawed by its failure to apply the "utmost . . . deference" standard referred to above.

B. *Substantive Law*

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that a municipality is liable under 42 U.S.C. § 1983 only when execution of its policy or custom causes a plaintiff to suffer constitutional injury. Since *Monell*, the Court has continued to explore the contours of municipal liability under § 1983. In a case involving a police shooting allegedly caused by inadequate training, the Court determined that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

The District contends that inadequate training cannot amount to a custom or policy giving rise to liability under 42 U.S.C. § 1983 as required by *Monell* and that even if it could, the Parkers' proof does not support a

finding of such a custom or policy. We disagree. Unlike *Tuttle*, this case does not involve a single incident that gives rise to an inference of inadequate training. It involves a sad series of mishaps linked to a policy of sorely deficient training, supervision and discipline.

Although the Supreme Court has not yet resolved the question, the issue of whether liability can arise for injuries caused by a policy of inadequate training has come to the attention of the Court. *See City of Springfield v. Kibbe*, 107 S.Ct. 1114 (1987); *Tuttle*, *supra*, 471 U.S. at 814 n.2. In *Kibbe*, for example, the Court originally granted certiorari to address the question of inadequate training and liability under *Monell*, but dismissed such certiorari as improvidently granted upon determining that the petitioner failed to preserve the "fairly included" question, *see* Supreme Court Rule 21.1 (a), of whether more than negligence in training is required in order to establish such liability.

In *Tuttle*, the Court rejected a finding of § 1983 municipal liability for inadequate training based on a single incident of police misconduct. Whether the facts of a particular case could contain sufficient examples of misconduct to infer a policy of inadequate training was a question left unresolved by *Tuttle*. The Supreme Court has, however, recently accepted for review the sixth circuit case of *City of Canton v. Harris*; the issue of inadequate training for law enforcement officers and its relationship to municipal policy would appear intrinsic to that case. *See City of Canton v. Harris*, No. 85-3314, slip op. (6th Cir. Sept. 5, 1986), *cert. granted*, 108 S.Ct. 1105 (1988) (No. 86-1088).

Until we receive contrary direction from the Court, we believe that section 1983 liability may be found under *Monell* when there is evidence of deliberate indifference manifest by systemic and grossly inadequate training, discipline, and supervision. We also believe that the

standard articulated in the instruction proffered to the jury in this case reflects a proper standard. Limiting *Monell* to affirmative policies that violate constitutional protections is not necessary; the "policy or custom" language of *Monell* warrants no such conclusion. *See generally* Note, *Municipal Liability for Police Misconduct: Must Victims Now Prove Intent?*, 97 Yale L.J. 448 (1988).

As another panel of this court recognized in *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986), "[p]olice misconduct cases such as this one . . . do not involve express statements of policy. . . . To succeed, a plaintiff must show a course deliberately pursued by the city. . . ." To establish the existence of a *Monell* pattern or policy, a plaintiff must present "concentrated, fully packed, precisely delineated scenarios." *Id.* at 125.

Thus, we uphold the district court's conclusion that liability may be imposed on a municipality upon a showing of deliberate indifference exhibited by a pattern of inadequate training, supervision and discipline of police officers provided there is a causal connection between such inadequacies and the risk of harm to others. *Accord, e.g., Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 752 (1988); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2d Cir. 1986) ("deliberate indifference"), *cert. denied*, 107 S.Ct. 1384 (1987); *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (so grossly negligent as to constitute "deliberate indifference").

The incidents giving rise to the case at bar present the requisite "fully packed" scenario. Inadequately trained officers—in terms of both arrest procedure and physical aptitude—committed a series of mistakes resulting in serious injuries to an innocent man. There were

no consequent sanctions or even reprimands. From these facts, a clear pattern of inadequate police training and discipline emerges.

C. *Specific Challenges*

The District challenges the jury's determination on two grounds. First, the District contends that the evidence was not sufficient to establish inadequacies in training, discipline or supervision. Second, the District claims that even if some such deficiencies were established, they were not the "moving force" behind Mr. Parker's injuries because Mr. Parker's own actions were superseding causes. Both of the District's challenges go to factual issues which were before the jury, and we will not disturb its findings in this case.

We find that there is ample evidence in the record to support the jury's finding of deliberate indifference to adequate training, supervision and discipline. For instance, Roy C. McLaren, Chief of Police at Miramar, Florida and co-author of *Police Administration*, a widely used police textbook, testified as an expert regarding the ROP's training in extrajurisdictional arrest procedures. In Chief McLaren's opinion the ROP officers lacked sufficient knowledge in this area.

> A: Although the outline for the training consists of one week of instruction, the amount of instruction given to the officers, from what I can gather from looking at the reports and depositions and the responses made by the officers, the actual instruction given to them for some of the activities that they had to confront was inadequate.
>
> Q: And in what way was it inadequate, Chief McLaren?
>
> A: It failed to cover the circumstances that they would confront in making an arrest or a detention in Maryland, in Prince Georges County or in the State of Maryland, or in any outside jurisdiction out-

> side of the District, and it did not give instructions on how to remain in contact with headquarters and guidance on what to do in the event that that contact was lost, in the event that they could not maintain radio contact or telephone contact with their supervisors.
>
> And it did not clarify the authority that the officers would have in making an arrest or a detention on an individual outside of the District of Columbia.

Transcript at 677-678.

Indeed, the officers' training regarding extrajurisdictional arrest authority consisted of a single memo by the head of the ROP, Edward Spurlock. Mr. Spurlock's memo failed to disclose that the ROP was authorized to arrest suspects in Maryland in circumstances like those leading up to the shooting underlying this case.

We have considered also the record evidence on Officer Hayes' general physical training and, specifically, his disarmament training and believe that it too illustrates deliberate indifference to adequate training. Charles W. Bates, a security consultant and former F.B.I. agent, testified as an expert regarding Officer Hayes' disarmament training. Agent Bates described, and eventually demonstrated on the Parkers' counsel, how Officer Hayes could have subdued Mr. Parker without use of deadly force. *See* Transcript 281-285. According to Agent Bates, Officer Hayes' failure physically to subdue Mr. Parker evidenced a serious deficiency in the officer's training program.

It is undisputed that Officer Hayes had no physical training for four years prior to the Parker incident. Indeed, he was off duty because of a fractured shoulder until just two months before the incident that gave rise to this lawsuit. Given Officer Hayes' physical condition, it is not hard to fathom that his most effective method for subduing the objects of his pursuits would be the use of

a firearm as opposed to the application of physical force. Officer Hayes simply was not in adequate physical shape. This condition posed a foreseeable risk of harm to others. We are persuaded that a fair-minded jury could have concluded that Officer Hayes' conduct was the result of deliberate indifference on the part of the District with respect to the physical training of its police officers.

As to the inadequacies of its discipline and supervision, a telling example is the District's failure to take any disciplinary action whatsoever with respect to Officer Hayes. Assistant Police Chief Theodore Carr, the administrative officer responsible for reviewing cases involving alleged misconduct, determined that Officer Hayes mishandled the Parker incident and should have been "recycled through the firearms training course so that any—so he can be refreshed in terms of policies and procedures." Transcript at 920. Despite this internal order, no such action was ever taken.

We turn now to the District's challenge to the jury's finding on causation. As the District correctly points out, a municipal policy must be the "moving force" behind the alleged constitutional violation before a plaintiff may recover under section 1983. *Tuttle, supra,* 471 U.S. at 820. In this circuit, a municipal policy is deemed to be the moving force of a constitutional injury if the

> conduct is a substantial factor in bringing about harm. . . . The defendant may be held liable for harm that is "foreseeably attributable" to his conduct as well as for unforeseeable harm attributable to his conduct, unless it appears that the chain of events is "highly extraordinary in retrospect."

Morgan, supra, 824 F.2d at 1062-63 (quoting *White v. United States,* 780 F.2d 97, 106 (D.C. Cir. 1986)) (citation omitted).

We can easily conclude that the record supports the jury's determination that the District officers' deficient

training was a substantial factor in bringing about Mr. Parker's injuries. The unreasonable use of deadly force was an immediate cause of such harm. Officer Hayes shot at Mr. Parker four times. He resorted to use of his gun because he was unable physically to subdue Mr. Parker by less drastic means; his physical condition was deficient because the District was deliberately indifferent to his physical training program.

Moreover, the record adequately supports the finding that the officers' misunderstanding of their extrajurisdictional authority caused the underlying confused atmosphere. Chief McLaren articulated the nature and dangers associated with such confusion. He testified that "[t]he confusion may introduce uncertainty in the mind of the person that they are confronting so that in fact, a person being confronted in the field by a police officer . . . may act differently than the person would have had that element of confusion not been there." Transcript at 682. The record establishes a "substantial factor" relationship between the officers' uncertainties and Mr. Parker's reaction. Considered together with Officer Hayes' lack of physical conditioning and disarmament training, the circumstances giving rise to Mr. Parker's injuries persuade us that the moving force element of *Monell* is satisfied.

To bolster its moving force argument, the District attempts to analogize this case to *Cameron v. City of Pontiac*, 813 F.2d 782 (6th Cir. 1987). In the latter case, the plaintiff filed a cause of action under 42 U.S.C. § 1983 alleging that a Pontiac police officer's unreasonable use of deadly force caused her husband's death; he was hit by a truck when he ran across a highway in an attempt to escape from a city police officer. The court of appeals for the sixth circuit upheld the trial court's determination that the plaintiff's death was "completely independent" of the application of deadly force by the defendant's employee-police officer.

The District contends that *Cameron* is similar to the case at bar. Accordingly, the District urges us to adopt the *Cameron* court's reasoning and reject the existence of a causal connection between Officer Hayes' conduct and Mr. Parker's injuries. We disagree. The chain of events leading to Mr. Cameron's death was "highly extraordinary in retrospect." *Morgan, supra*, 813 F.2d at 1063. "[Mr. Cameron] was killed when he, at his own election, ran onto a high speed freeway. The district court was correct in concluding that this was unforeseeable, and that it would be an absurd result indeed to permit recovery for a felon's unwise choice of an escape route." *Cameron, supra*, 813 F.2d at 786

Unlike Mr. Cameron, Mr. Parker was not injured when he was run over by a truck passing coincidentally along his escape route, he was seriously injured when the plain-clothed police officer, who did not possess an arrest warrant, chased him and shot at him. The connection between Officer Hayes' actions and Donald Parker's injuries can readily be found to be direct and causal whereas the connection described in the *Cameron* case is far more attenuated and non-causal. We conclude that the jury's verdict on this issue is not unreasonable.

D. *Jury Instructions*

The defendant also contends that reversal is warranted by the trial court's decision not to charge the jury regarding use of deadly force according to the language set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985). In that case the Supreme Court held as follows:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the

> infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

Before the jury was instructed, the parties argued about the contents of the charge to be submitted to the jury. At that time, the District advocated the use of an instruction that included language quoted from *Tennessee v. Garner*, contending that the District's official policy is consistent with this language.

What the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge. That Officer Hayes may have believed that he was being threatened, and that he did, in fact, issue an oral warning to Mr. Parker to "freeze," does not dispose of this aspect of the appeal. The jury was charged with evaluating the adequacy of District police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem Judge Green's instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law of this fact-bound case.

Furthermore, the District failed properly to preserve its objection on this matter. The District requested the giving of a *Garner* instruction and Judge Green denied this request. In so doing, Judge Green commented that the District's request, and its underlying interpretation of *Garner*, could constitute interesting issues for appeal. Judge Green's comments, however, did not preserve the issue for appeal. Rule 51, Federal Rules of Civil Procedure, sets forth the procedure for effectively preserving challenges to jury instructions: "No party may assign as

error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" *Id.* (emphasis added). The District failed to adhere to Rule 51; it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate. Absent such specified objection, it would be overreaching for this court to reject the instructions and to upset the jury's verdict.

The current posture of this case distinguishes it from a recent decision in which the Supreme Court did not require strict compliance with the requirements of Rule 51. In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), the court declined to dismiss a challenge to a jury verdict imposing municipal liability despite the petitioner's failure timely and properly to preserve its objection to a portion of the underlying jury instruction. The Court found that dismissal subsequent to its decision to grant certiorari would "undermine the policy of judicial efficiency that underlies Rule 51." *Id.* at 922. By contrast, policies of judicial efficiency and finality of judgments require us, at this relatively early stage of the appellate review process, to adhere to the clear directives of Rule 51. In any event, we are convinced that the instructions presented to the jury did not contain any flaws which rise to the level necessary to constitute plain error.

Therefore, we affirm the judgment of the district court.

WILLIAMS, *Circuit Judge*, dissenting: A seasoned District of Columbia police officer grappled with a bank robbery suspect who was attempting to hijack an innocent woman's car and—as she happened to be in it—kidnap the woman. The suspect slipped from the policeman's grasp and thrust his right hand toward his waistband. The officer drew his service revolver and ordered the suspect to halt. The suspect did not heed the warning; his right hand obscured from view, he turned toward the policeman. The police officer had only a millisecond in which to act. Believing that his life and the life of the innocent woman were in immediate peril, he fired four times in quick succession. The suspect, who had not been armed after all, fell to the ground a paraplegic.

With the benefit of hindsight it is now clear that the officer need not have shot the suspect. But the jury, informed of the officer's vantage point at the time of the shooting, found his actions not unreasonable; it rejected the plaintiff-suspect's assault and battery claim against the District. However, perhaps out of sympathy for the victim, the very same jury found the District liable under 42 U.S.C. § 1983 (1982). § 1983 provides for a damage action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .

Parker's § 1983 theory argued that the District's inadequate training of its police force deprived him of his Fourth Amendment right not to be seized with unreasonable force. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

The District moved for a judgment N.O.V., which the trial court denied. The majority affirms, with an opinion nominally accepting the view that municipalities may be

liable under § 1983 for inadequate police training only if the acting officer's violation stemmed directly from municipal policymakers' "deliberate indifference" to such violations. The court's words are equivalent to those employed in other circuits. *See, e.g., Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (liability may be found where city pursues police training so defective that "the municipality exhibits a deliberate indifference to the resulting violations of a citizen's constitutional rights" (internal quotations omitted)). Its application of the standard, however, drains the words of any constraining force. Accordingly, and fully recognizing that a lengthy dissent based the probative value of specific evidence "is seldom worth writing or reading," *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984) (Scalia, J., dissenting), I must set out my quite different view of the evidence. The majority also dismisses the District's well-founded objection to the trial court's erroneous charge on the constitutional limits on the use of deadly force. I dissent on that issue as well.

I. Background

To support its outcome in this case, the majority paints a distorted portrait of the police officer whose actions are at issue, unnecessarily maligning him in the process. *See, e.g.*, Maj. Op. at 9-10. Although many of the facts surrounding the shooting of Donald Parker are in dispute, Officer William Hayes's record and qualifications are not. A highly-decorated army helicopter pilot and Vietnam combat veteran, Hayes joined the Washington metropolitan police force in 1971. Testimony of Hayes, Tr. 1671-90. In his first six years on the force his duties ranged widely. He worked as an undercover agent infiltrating and investigating the Black Panther Party, and did stints in the homicide, civil disturbance and special operations divisions. *Id.* at 1690-1715. During his time in special operations he was essentially a member of a

SWAT team, *id.* at 1708, and received intensive training in numerous law enforcement skills, including hostage negotiations, riot control, and disarming armed and dangerous suspects. *Id.* at 1703-10. His performance on the street was extraordinary. He participated in over 200 arrests, *id.* at 1711, earned more than a dozen commendations, *id.* at 1722, and on at least three occasions single-handedly arrested armed felons, *id.* at 1722-25. With the exception of the incident central to this case, and of course in practice at the firing range, Hayes never found it necessary to discharge his service revolver. *Id.*

In 1982 Hayes applied for a position in the District's new repeat offenders project ("ROP"), a special police unit created to focus on suspects who were believed to be committing a disproportionate number of crimes in the District. In April, he was hand-picked from a field of about 500 applicants to be one of 88 ROP operatives. Testimony of Inspector Spurlock, Tr. 1532-35. Before hitting the streets, each ROP officer completed a specially designed, intensive one-week training program.

On the morning of November 15, 1982, Hayes and his partner, Ronnie Lee Motley, were instructed to find out the whereabouts of Donald Parker. Parker was believed to have participated with Charles "Dusty Face" Johnson in an armed robbery of a pharmacy, and there was a warrant out for his arrest. Before starting the search, Hayes checked Parker's file, and learned that Parker had several arrests and prior convictions for, among other offenses, armed robbery and carrying a pistol without a license. Testimony of Hayes, Tr. 1742. Parker was currently on parole for armed robbery of a bank. *Id.*

After pursuing what turned out to be a bum lead, Officer Hayes and Motley were instructed, by radio, to proceed to the home of a woman who was believed to be Parker's estranged common-law wife to see if she could help them locate Parker. When they arrived at Mrs.

Parker's residence in Oxon Hill, a Maryland suburb of the District, the officers attempted to reach their dispatcher, but found that they could not; they were apparently in a "dead spot"—a place where a physical obstruction prevents the transmission of readable radio signals. Testimony of Motley, Tr. 368-71. The officers approached the door and knocked; Mrs. Parker appeared at a window. The officers identified themselves as District police officers. They then asked whether she would be willing to answer a few questions. Without replying, Mrs. Parker withdrew from view. Soon Donald Parker, whom Hayes recognized from his photograph, appeared at the window. The officers once again identified themselves and informed Parker that they were there to investigate a criminal matter involving him. Parker invited the officers in.

Once inside, the officers noticed the presence of two small children. Testimony of Hayes, Tr. 1773-74. Unsure of his extrajurisdictional arrest authority and sensitive to the potential for violence or a hostage situation within the home, Testimony of Hayes, Tr. 1773-74, Hayes told Parker of the outstanding warrant for his arrest and attempted to persuade him to voluntarily accompany them to the station. Parker denied participation in the crime,[1] and refused to accompany the officers unless they could produce a warrant. As the officers were on an investigative mission and had not expected to find and confront Parker, they didn't have the warrant with them. The officers then suggested alternatives: Parker could call an attorney to meet him at the station, *id.* at 1776, or allow the officers to phone the Prince George's County police to effect the arrest, *id.* at 1773. But neither option was

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[1] Hayes later testified that Parker, after being informed that his alleged co-suspect was Dusty Face Johnson, claimed to be on the outs with Dusty Face, having recently shot his alleged accomplice five or six times in a dispute over money. Testimony of Hayes, Tr. 1775.

possible; Parker said his phone was disconnected. *Id.* at 1776. The police, for their part, refused to leave without their quarry. Stalemate. Eventually Parker agreed to accompany the officers so long as they would first permit him to dress. The officers agreed and allowed him to go to his bedroom. A couple of minutes later, Hayes noticed the dining room curtain move. *Id.* at 1786. He looked out the window in time to see Parker leap to the ground from his bedroom window ledge. *Id.* Hayes and Motley ran for the door, and the chase was on.

Motley pursued Parker on foot through a nearby wooded area. Hayes returned to the car and drove it to the spot where Parker and Motley had entered the woods. Parker, having circled back, emerged from the woods and ran, hands waving, towards Hayes's car. Hayes stopped the car and began to open the door. Testimony of Hayes, Tr. 1794. Upon recognizing Hayes as the driver, Parker turned and ran in the opposite direction. *Id.* at 1795. As Hayes stepped out of his car to give chase, it was rear-ended by a Volvo (driven by Desrine Rainford), Testimony of Motley, Tr. 345; Testimony of Hayes, Tr. 1795, and knocked into a roadside ditch. Parker ran to the driver's side of the Volvo, opened the door, shoved Rainford aside, and leaped into the car, half onto Rainford's lap. Testimony of Rainford, Tr. 889-90, 893; Testimony of Hayes, Tr. 1796.

When Hayes approached the car, he saw Parker's foot near the accelerator and his right hand on the steering wheel. Fearing a hijack and hostage-taking, he ordered Parker to halt. Parker refused, saying "F—— you. I gonna . . . ." Testimony of Hayes, Tr. 1797. Hayes grabbed Parker, lifting him from the automobile. *Id.* at 1800. But Parker somehow managed to yank himself from Hayes's grasp and put his right foot back in the car. *Id.* at 1801. When Hayes tried again to extract Parker from the car, he saw Parker's right hand move towards his waistband. *Id.* at 1805. (Parker may have

so gestured because Ms. Rainford had just poured her cup of tea on his crotch. Testimony of Rainford, Tr. 894). Believing that Parker was reaching for a gun, Hayes stepped back and drew his service revolver, yelling "Freeze, Parker, don't do it." *Id.* at 1803. His right hand still obscured by his body, Parker began to turn toward Hayes. *Id.* at 1804. Hayes was familiar with Parker's history of weapons offenses and had reason to believe that Parker had shot Dusty Face five or six times over money. *Id.* at 1805. In the split second in which he had to make a decision, Hayes thought that Parker was armed and that Parker posed an immediate threat to his life and Ms. Rainford's. *Id.* at 1806. Hayes discharged his revolver four times in quick succession, hitting Parker twice. Parker, who, as it turned out, had not been armed, slumped across the automobile door, staggered a few steps and fell.

One of Hayes's bullets lodged in Parker's spine. As a result of the shooting Parker is now a paraplegic. It is clear, in retrospect, that neither Rainford's nor Hayes's life was in imminent peril. Parker was needlessly crippled. The question before this court, however, is not whether Hayes actually needed to shoot Parker. Rather, the issues are first, whether the jury was properly instructed, and second, whether even a properly instructed jury could reasonably find that the District pursued a police training program so defective as to manifest "deliberate indifference" to the risk of constitutional violations by its police force, and that such defects caused Parker's injury.

This dissent will first analyse the error in jury instructions. It will then review the origins of the "deliberate indifference" standard and the reasons for drawing a rigorous distinction between it and mere negligence. Finally, it will review the evidence in light of that standard.

II. Errors in the Jury Instruction

To find the District liable under § 1983, the jury had first to find that Hayes violated Parker's Fourth Amendment right to be free of unreasonable seizures. *Tennessee v. Garner*, 471 U.S. 1 (1985). Parker introduced expert testimony that it is unreasonable for an officer to shoot until he has actually seen a weapon. Although this testimony was properly before the jury in reference to Parker's common-law claims, McLaren's concept of acceptable police conduct conflicts with and is more stringent than the governing Fourth Amendment standard. In *Garner*, the Court held that it is not unreasonable for a police officer to use deadly force when he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. Regardless of its relative merits as a matter of police policy, McLaren's standard is clearly more demanding than the Supreme Court's test; it makes actual sight of the weapon essential and thus precludes any reliance on circumstantial evidence. Thus the jury could not properly consider McLaren's standard in its decision as to whether Hayes violated Parker's Fourth Amendment rights.

To prevent the jury from adopting McLaren's standard as its constitutional benchmark, the District requested the district court to instruct the jury in terms of *Garner*'s definition of constitutionally permissible use of deadly force. Before the court charged the jury, the District's counsel reviewed Judge Green's proposed instructions and requested that she add "at least the second paragraph of [its] proposed instruction No. 4." Tr. 2196. This paragraph reads, in part, as follows: "Under the fourth amendment, it is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm, either to the officer or to others." Judge Green noted the District's

objection to the existing instructions, but refused to so alter them. Tr. 2196-97. In view of the drastic gap between the law under *Garner* and McLaren's testimony, as well as the confusion manifested by the jury's inconsistent verdicts (see pp. 27-28 & n.3 below), the error was far from harmless.

The majority dismisses the error with the claim that the District "failed to adhere to Rule 51 . . . [when] it neglected to state distinctly its specific objections to Judge Green's charge before the jury retired to deliberate." Maj. Op. at 14. But in fact Judge Green explicitly stated, just before the jury retired, that the parties should state only *new* objections to the instructions as given, as she considered the objections made in the previous day's colloquy already preserved for the record. Tr. 2230-31. I cannot grasp why the court now faults the District for having refrained from a repetition that would have defied the judge's instructions and likely have been contemptuous. To do so is not to preserve orderly trial procedures but to invite their disruption.

As the jury may well have found the predicate constitutional violation using an invalid standard, its § 1983 verdict should not stand.

The instructions included a second critical error, this one on the standard applicable to the District itself:

> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that the District of Columbia failed adequately to train, supervise and discipline Officers Hayes and Motley and that this failure constitutes gross reckless and gross indifference to the civil rights of Mr. Parker *in that such inadequate training, supervision and discipline would involve a risk of harm to others.*

Tr. 2222 (emphasis added). The italicized portion of this instruction implies that a finding of gross recklessness or gross indifference is called for once the jury deter-

mines that the training was "inadequate" in any way that would "involve a risk to others." Not even an "unreasonable risk! This suggested a standard even lower than one of common-law negligence, essentially one of strict liability. Such low-level "inadequacies" plainly do not reflect the "deliberate indifference" to constitutional violations that all members of the panel agree is the correct standard (explained in detail in part III).

Had the District properly objected to this conception of § 1983 liability and then raised the matter before us, it would require reversal. Had it merely raised the matter for the first time on appeal, I would find plain error. *Cf. Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469 n.1 (D.C. Cir. 1987) (acknowledging uncertainty as to whether this circuit recognizes the "plain error" doctrine in civil cases). In fact it did neither. Although *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983), wisely counsels that we should normally not address unbriefed issues, it does so on the premise that we would otherwise be deprived "of that assistance of counsel which the system assumes." *Id.* As we need no such assistance on the point, I think it an independent ground of reversal.

In any event, the *Garner* error calls for reversal of the judgment and remand for a new trial.

III. The "Deliberate Indifference" Standard

As the majority and I agree that a municipality should be liable under § 1983 for unconstitutional acts resulting from inadequate police training only if its training policies reflect "deliberate indifference" to those violations, it may seem pointless to argue the legal standard. But it is facts that give words their meaning. In China after Mao, it is said that many parroted the slogan attributing the country's ills to the "Gang of Four," but simultaneously held up a hand with five fingers outstretched--

an extra one for the Great Helmsman himself. Here the majority talks deliberate indifference, but I can fathom their belief that the facts satisfy that standard only as a product of their reluctance to acknowledge the policies restricting municipal liability under § 1983. I write to underscore the force of those policies and the reasoning behind the requirement of deliberate indifference.

In *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that cities and other local governing bodies are "persons" subject to liability under § 1983, overruling its decision to the contrary in *Monroe v. Pape*, 365 U.S. 167 (1961). But it explicitly rejected the idea of *vicarious* municipal liability. *Id.* at 690-95. Rather, the Court accepted liability only where "execution of a government's policy or custom . . . inflicts the injury," *id.* at 694, or (in a formulation seemingly intended as identical) where "official policy" has been "the moving force of the constitutional violation," *id.*; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8 (1985) (reiterating the "moving force" metaphor and condemning "loose language in the charge leaving it to the jury to determine whether the alleged inadequate training would likely lead to 'police misconduct' "); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

For reasons that will soon be apparent, § 1983 liability for egregiously defective police training is compatible with *Monell*'s requirement of a municipal policy; the other circuits facing the issue since *Monell* have so found. The majority's statement of the law appears to coincide with their views. Under this consensus, a municipality's inadequate training of police can give rise to liability under § 1983 if (1) the training is so grossly negligent or reckless as to reflect deliberate indifference to the constitutional violations that will inevitably result, and (2) the inadequate training is the moving force behind a violation of a plaintiff's constitutional rights. *See* cases

cited at Maj. Op. at 7; *see also Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.) ("so reckless or grossly negligent that future police misconduct is almost inevitable . . ., or would properly be characterized as substantially certain to result") (citations omitted), *cert. denied*, 459 U.S. 833 (1982); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981) (deliberate indifference or tacit authorization); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981) (simple negligence not sufficient), *cert. denied*, 456 U.S. 979 (1982).

Liability for deliberate indifference serves as a backstop to liability for *explicit* municipal authorization of § 1983 violations. Without it, municipal policymakers could wink at rampant police misconduct but keep the municipal treasury safe. Of course where plaintiffs could prove the wink, the resulting violations would be chargeable to the city as explicit policy. But proof of a wink may fail for no fault of the plaintiff, and on a strong enough record the fact-finder should be able to infer tacit complicity.

Grounding liability for deliberate indifference in a backstop function finds support in *Monell*'s discussion of the inclusion in § 1983 of "customs" and "usages" among the state prescriptions under "color" of which the forbidden deprivation may occur. The Court quoted Justice Harlan's point in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970), that custom and usage were included "because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *See Monell*, 436 U.S. at 691. Just as including state involvement through discriminatory practice prevents evasion through, as it were, government body language, so liability for deliberate indifference prevents evasion through a calculated

municipal failure to cure training defects with a hi and obvious probability of generating excessive constit tional violations.

The backstop role surely requires no more expansi a standard than that of deliberate indifference. The que tion remains whether a reasonable construction of § 19 and *Monell* suggests more. Of course Congress's ma target in adopting the predecessor of § 1983 was t Klansmen's brutalization of the freedmen. Although Co gress obviously provided a remedy against broader evil *cf. Monell*, 436 U.S. at 683, it would be startling to fir it evolve into a basis for federalizing (and judicializing the complex political issue of how to reduce the impe fections of municipal government.

The Court's language in *Monell* appears to refer onl to policy decisions that can be linked by *intention* to th resulting constitutional violations. The Court held, pe Justice Brennan, that "[l]ocal governing bodies . . . ca be sued directly under § 1983 . . . where . . . the actio that is alleged to be unconstitutional *implements* or *exe cutes*" a governmental policy. 436 U.S. at 690 (emphasi added). The words "implement" and "execute" surely connote a direct and intentional link between the policy and the unconstitutional outcome. Police officers' consti tutional infringements do not "implement" or "execute' a sloppy training policy. *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 n.11 (1986) (noting that both the plurality and concurrence in *Tuttle* "found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy" (emphasis in original)).

Certainly the subsequent opinions of the justices provide little support for any more expansive liability. The Court came closest to addressing the issue explicitly in *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987), but a five-justice majority (Justices Brennan, Marshall,

Blackmun, Stevens and Scalia) dismissed the writ as improvidently granted; the defendant city's petition for certiorari had not objected to the jury instruction permitting liability on the basis of *gross* negligence. Those who dissented evidently regarded that instruction as too lax. Writing for herself and Chief Justice Rehnquist and Justices White and Powell, Justice O'Connor took the position that " 'inadequacy' of police training may serve as the basis for § 1983 liability *only* where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." 107 S. Ct. at 1121 (O'Connor, J., dissenting).

The *Kibbe* dissenters identified an inherent hazard in imposing § 1983 liability for municipal policies that do not *compel* a constitutional violation. Because of the confusion arising from intervening causes, even a nominally stringent causation requirement could not prevent damage judgments based on illegitimate jury conjecture:

> [A]t the time of the officers' alleged misconduct, any number of other factors [may have also been] in operation that were equally likely to contribute or play a predominant part in bringing about the constitutional injury: the disposition of the individual officers, the extent of their experience with similar incidents, . . . and so forth. To conclude, in a particular instance, that omissions in a municipal training program constituted the 'moving force' in bringing about the officer's unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture.

107 S. Ct. 1114, 1120-21 (1987).

But the expressions of the justices composing the *Kibbe* majority hardly suggest a readiness to find liability much more readily. As we have noted already,

Justice Brennan's opinion for the Court in *Monell* itself found liability where an unconstitutional act "implements or executes" municipal policy, language strongly suggesting deliberate intent. He also noted that some congressional supporters of § 1983 had made clear that they intended the Act to reach situations where "officers of the State were *deliberately indifferent* to the rights of black citizens." 436 U.S. at 685-86 n.45 (emphasis added). In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), where the majority overturned a judgment against a municipality because the charge allowed the jury to infer " 'gross negligence' or 'deliberate indifference' " from a non-policymaker's single excessive use of force, *id.* at 821, he concurred, and, writing for himself and Justices Marshall and Blackmun,[2] observed that the plaintiff "bore the burden . . . of proving" that his injuries resulted from " 'conscious choices' . . . made by the city concerning police training and supervision," *id.* at 829-30 n.4 (internal citation omitted). In *Tuttle*, moreover, Justice Brennan explicitly rejected mere "but for" causality, invoking at least the limiting principles of tort law. *Tuttle*, 471 U.S. at 833 n.8. Finally, in Part II-B of his opinion in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), concurred in by Justices White, Marshall and Blackmun, he wrote that

> municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84. *See also* George D. Brown, Municipal Liability Under Section 1983 and the Ambiguities of Bur-

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[2] Justice Stevens has consistently rejected *Monell*'s refusal to allow liability under *respondeat superior*. *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. at 834-44 (Stevens, J., dissenting).

ger Court Federalism: A Comment on *City of Oklahoma City v. Tuttle* and *Pembaur v. City of Cincinnati*—the "Official Policy" Cases, 27 B.C.L. Rev. 883, 901 (1986).

In all candor, Justice Brennan's requirement of "conscious choice" is susceptible of a very expansive reading. He refers to specific municipal choices on police training, including not only issues going to the *content* of police courses ("when to shoot to kill"), but also such neutral issues as "how much time and emphasis [should] be placed on training in such matters as how to approach felony-in-progress situations." *Tuttle*, 471 U.S. at 829-30 n.4 (Brennan, J., concurring). But this list appears simply to have been identified by plaintiff. *Id.* at 829 & n.4. Justice Brennan cannot be described as committed to the view that neutral municipal police training decisions, short of unleashing officers manifestly incapable of observing constitutional norms, would trigger liability.

Court decisions in closely related areas also warn strongly against imposition of § 1983 liability for misjudgments that at most increase the risk of constitutional violations. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the district court had issued an injunction against municipal officers merely upon a showing of an "unacceptably high" number of unconstitutional acts by their subordinates, *id.* at 373, arguably caused by a departmental "tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct," *id.* at 368-69. The Court refused to countenance this judicial intervention. It contrasted these facts with those of the decision principally relied on by the district court, *Hague v. CIO*, 307 U.S. 496 (1939), in which "liability and injunctive relief were grounded [on] the adoption and enforcement of deliberate policies by the defendants there . . . of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City." *Id.* at 374.

In *Rizzo*, by contrast, there was no showing that the "behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere." *Id.* at 375. The Court found that "[n]othing in *Hague* . . . , or any other case from this Court, supports such an open-ended construction of § 1983." *Id.* at 373-74. Although *Rizzo* rested in part on a concern for the ill effects of injunctive intervention in the management of municipal police, it is hard to see that intervention through the imposition of large damage judgments would be materially less intrusive.

In the definition of Due Process, too, the Court has recently rejected the use of federal constitutional norms to supplant state policy on governmental negligence. In *Daniels v. Williams*, 474 U.S. 327 (1986), it held that prison custodians' "lack of due care," far from being an "abuse of power" cognizable under the Due Process Clause of the Fourteenth Amendment, "suggests no more than a failure to measure up to the conduct of a reasonable person." *Id.* at 332. *See also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (refusing to find due process clause liability under similar facts, even though state law immunities barred plaintiff from any state remedy; "lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent"). The context is of course distinguishable; the Court addressed individual liability for violations of the Constitution's most open-ended provision and expressly left open the possibility that mere negligence might in some cases subject individuals to § 1983 liability under other provisions. *Daniels v. Williams*, 474 U.S. at 334. Indeed, for a claim such as Parker's, that the use of unreasonable force made an arrest illegal under the Fourth Amendment, *individual* liability turns on "an objective standard of reasonableness . . . determined by balancing the infringement of the individual's interest caused by the police action against the governmental interest served." *Martin v. Malhoyt*, 830 F.2d

237, 261 (D.C. Cir. 1987) (§ 1983 action in which court applies standard set forth in *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). But nothing in *Monell* suggests any reason to suppose the Court intended the sort of close federal judicial control of municipal policy implicit in a rule of liability for a city's negligence in failing to prevent its officers' unconstitutional acts (whatever state-of-mind may be required for *their* liability).

As the majority notes, a Supreme Court analysis of municipal liability for inadequate police training under § 1983 appears imminent. *See City of Canton v. Harris*, No. 85-3314, slip op. (6th Cir. Sept. 5, 1986), *cert. granted*, 56 U.S.L.W. 3601 (U.S. March 7, 1988) (No. 86-1088). The majority and I agree on "deliberate indifference" as the operative words of the likely formula. But one's perception of the force of a definition may depend on his sense both of the difficulty of defining a causal link and of the need for a sharp line between municipal negligence and actions so "abusive" as to invoke the majesty of federal constitutional intervention. Under *Monell* itself, illuminated by such decisions as *Rizzo* and *Daniels*, I think liability can be found only on a showing that municipal policymakers would have thought to themselves: "Yes, we recognize that our police training decisions are bound to generate an exceptionally high number of constitutional violations, but that's just tough." Parker made no such showing here. If the courts are not to federalize much of municipal government policy the courts of appeal must seriously police the border between garden-variety snafus and truly deliberate indifference to low-echelon constitutional violations.

IV. Application of the Standard to the Evidence

In reviewing the District's claims on appeal, we must of course accord the jury great deference, and uphold its verdict unless

> 'there can be but one reasonable conclusion,' drawn from the evidence viewed 'in the light most favorable to the plaintiff[] . . ., giving [him] the advantage of every fair and reasonable inference that the evidence may justify.'

Metrocare v. WMATA, 679 F.2d 922, 924-25 (D.C. Cir. 1982), *quoting Foster v. Maryland State Savings and Loan Ass'n*, 590 F.2d 928, 930 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). Our review proceeds, howver, without deference to the trial court's denial of the motion for judgment N.O.V. *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 641 (D.C. Cir. 1988). Upholding the verdict below requires the court to decide that a reasonable jury could have concluded that the District's training policies manifested deliberate indifference to any enhanced likelihood of causing constitutional violations and that the alleged deficiencies were the moving force behind the alleged violation. Because of errors in the district court's instructions it is not at all evident that this jury did so find. See part II above. I believe that even with proper instructions, a reasonable jury could not so find. I would reverse.

One further preliminary comment: Many circuits refuse to uphold a finding of deliberate indifference unless the plaintiff can demonstrate a pattern of violations, predating the instant violation, that should have put the municipality on notice that its training policies were dangerously inadequate. *See, e.g., Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 752 (1988); *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Herrera v. Valentine*, 653 F.2d 1220, 1224 (8th Cir. 1981); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981), *cert. denied*, 456 U.S. 979 (1982); *cf. Rizzo v. Goode*, 423 U.S. 362, 373-77) (in overturning injunction against city officials based on alleged violations by their subordinates, Court relies on absence of any

pattern of violations). *But see Grandstaff v. City of Borger*, 767 F.2d 161, 170-71 (5th Cir. 1985) (proof of multiple incidents of misconduct on night of the incident may indicate that the policemen knew at the time that their actions would "meet with the approval of city policymakers"), *cert. denied*, 107 S. Ct. 1369 (1987); *Kibbe v. City of Springfield*, 777 F.2d 801, 807-08 (1st Cir. 1985) (similar), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed*, 107 S. Ct. 1114 (1987). I will assume, *arguendo*, the laxer view—that on some imaginable facts one might find deliberate indifference without a pattern of prior similar conduct.

In order to prevail, Parker had to establish a defect in the District's training program, the requisite state of mind in municipal policymakers with respect to that defect, and a strong causal link between that defect and his constitutional injury. Each alleged training inadequacy must stand on its own. We cannot find the requisite links by combining distinct liability theories in a vague § 1983 goulash. To do so would render the concept of deliberate indifference meaningless and trivialize the causation requirement.

Parker argued five theories to support his § 1983 claim. I address them *seriatim*.

1. *Extrajurisdictional training.* Parker attempted to show that the District inadequately trained its officers as to proper extrajurisdictional arrest procedures and as to their extrajurisdictional arrest authority. A critical aspect of their alleged inadequacy, as the majority opinion's summary makes clear, *see* Maj. Op. at 8-9, was that it *understated* the officers' extraterritorial authority. Had the officers been properly trained as to their authority to make extraterritorial arrests, Parker argues, they would have simply and promptly arrested him. Appellee's Brief at 35-36. (District police officers with probable cause to believe someone has created a felony may make a citizen's

arrest in Maryland. *See Stevenson v. State*, 413 A.2d 1340, 1346 (Md. 1980).) Had they done so, he would not have been made nervous by the drawn-out stalemate, would not have attempted to flee, would not have attempted to hijack a stranger's car, and thus would not have been shot.

Of course it is quite true that the officers' ignorance of their full authority played a role in creating the awkward standoff. But it seems unprecedented to suggest that the issuance of instructions understating officers' authority could manifest deliberate indifference to the constitutional violations that might very indirectly result. On this remarkable theory it is as risky for a municipality to pursue a Milquetoast's strategy as a Rambo's. Parker of course introduced no evidence of a pattern of similar incidents or of any other circumstances that would have alerted District policymakers to the risk that such a knowledge gap carried a special risk of causing constitutional violations. I cannot perceive a basis for inferring the requisite deliberate indifference.

Further, Parker utterly failed to show the necessary causal link. At best, he has demonstrated "but for" causation. This is plainly not enough. *See Tuttle*, 471 U.S. at 833 n.9 (Brennan, J., concurring). Parker's theory minimizes the significance of intervening events and ignores the autonomy of the various players. It depends on the following causal chain: The District's inadequate training program left the officers confused as to their extrajurisdictional arrest authority, which created a tense atmosphere in the Parker home, which made Parker nervous and led him to attempt escape through his bedroom window, which resulted in a chase through the neighboring woods, which led to a confrontation between Parker and Hayes on the street which prompted Parker to attempt to hijack Desrine Rainford's car, which led Rainford to dump her tea on his lap, which caused Parker to reach his hand towards his pant while he was

struggling with Hayes, which gave Hayes the impression that Parker was reaching for a gun, which caused Hayes to shoot him. This out-*Palsgraf*s *Palsgraf*. On such a theory, the want of a nail was "the moving force" behind the kingdom's loss.

Cameron v. City of Pontiac, 813 F.2d 782 (6th Cir. 1987), properly rejected a similarly tenuous causal link. There policemen chased and shot at a fleeing suspect who, in an effort to escape, jumped a fence and sprinted onto a highway, where he was struck and killed by a passing truck. The court found that the policemen's use of deadly force "was not, as a matter of law, the proximate cause of [Cameron's] death." *Id.* at 786. Here, the District's training decisions were far less proximately connected to the ultimate shooting. (The majority seeks to distinguish *Cameron* on the ground that here Hayes's shooting was clearly the proximate cause of Parker's injury. Maj. Op. at 12. But that is not in question. Parker's problem was to show that flaws in the *District's extrajurisdictional training policies* were the moving force behind the shooting.

2. *Adequate warning.* Parker attempted to demonstrate that Hayes's warning to him—"Freeze, Parker, don't do it"—was dangerously imprecise. Even assuming it was negligent of Hayes not to use an affirmative command, like "Put your hands over your head," Parker introduced no evidence as to the District's policy on how officers should warn potentially armed suspects. The jury was not free to infer a municipal policy from a single episode. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Nor do I believe one can find deliberate indifference to constitutional rights in the District's going the "wrong" way—if it is wrong—on such a subtle point of police procedure.

3. *Fitness training.* Parker argued at trial that the District was grossly reckless in not establishing minimum physical fitness standards for officers in its ROP unit.

He claimed that had the District paid heed to fitness it would not have selected Hayes to be on the squad, and that if Hayes had been in reasonable shape he would have been able to handle the arrest without using his revolver.

Whatever the District's actual policies on the fitness of ROP officers, Hayes appears to have been in fine shape. To be sure, Parker did present some testimony as to Hayes's fitness during various time periods considerably prior to November 1982. He established (1) that in 1977 Hayes was unable to continue his SWAT team duties because he had developed a heart condition, pericarditis, (2) that Hayes had received a few citations for being overweight sometime between 1977 and 1982, and (3) that Hayes had suffered a hairline fracture of his right shoulder in July 1982.

While these may be interesting historical facts, none suggests any defect in Hayes's physical condition *at the time of the shooting*. By 1979 Hayes had recovered from his pericarditis well enough to resume extracurricular physical activities. He jogged a couple of miles each day, worked-out in his free time, and participated in martial arts courses and casual athletics. Testimony of Hayes, Tr. at 239. When he applied to join the ROP in 1982, he felt entirely fit for active duty. *Id.* at 1730, 1733.

Hayes did indeed suffer a hairline fracture in July 1982 when another vehicle struck his patrol car. *Id.* at 1734-35. On account of that injury his superiors temporarily relieved him of active duty. *Id.* at 257. By September, however, two months before the present episode, he had recovered fully and was certified as fit by the Board of Surgeons at the Police and Fire Clinic. Testimony of Inspector Spurlock, Tr. 1559; Testimony of Hayes, Tr. 1736. He resumed his duties on the ROP. There, because of his size and strength, he was often designated the "ram person;" *i.e.*, the officer who, when necessary, knocks

down barricaded doors to facilitate police entry. Testimony of Inspector Spurlock, Tr. 1559. There is simply no basis for the canard that Hayes was "not in adequate physical shape." *Cf.* Maj. Op. at 10.

Further, the record contains no support for any finding that the District was deliberately indifferent to the danger posed by its failure to set minimum fitness standards. The only evidence bearing on the District's frame of mind was the testimony of Assistant U.S. Attorney Bowman, one of the founders of the ROP, who admitted that physical fitness probably ought to have been taken into account in officer selection. He attributed the oversight to the planners' assumption that most of the officers' surveillance would be by car. Tr. at 1334. This falls far short of deliberate indifference.

Finally, Parker presented no evidence whatsoever to support the thesis that any possible gap between Hayes's physique and Charles Atlas's was the moving force behind Hayes's failure to subdue him by hand. Acceptance of liability on this theory invites reliance on precisely the sort of rampant speculation and conjecture against which Justice O'Connor warned. *See* p. 13 above.

4. *Disarmanent training.* Parker asserts that if Hayes had received adequate disarmanent training he would have been able to subdue Parker physically, and would not have shot him. Parker organizes his support for this theory carefully, but the resulting structure is rickety indeed. He points to (1) expert testimony that Hayes should have been able to use conventional law-enforcement techniques to remove Parker from the car and render him harmless. Testimony of Bates, Tr. 282; (2) Hayes's deposition statement that his formal training in "hand-to-hand" combat—consisting of two 30-minute sessions in 1972—had been "next to nothing," Tr. 233; and (3) an expert's opinion that if the District had provided its police officers with only one hour of physical disarmament

training, that would have been inadequate. Testimony of McLaren, Tr. 693. All this is not remotely up to the task.

At no time did Parker's experts in fact review or analyse the District's training policy, much less assess it as inadequate. The main expert, Roy McLaren, testified only that *if* Hayes had received *only* two 30-minute sessions in disarming tactics, that would have been inadequate. Tr. 693.

The hypothesis was palpably false. It was founded solely on Hayes's reference to 60 minutes of police training in "hand-to-hand combat." But these 60 minutes were incontestably a small part of Hayes's overall training—the part consisting of *formal* training in how to attempt to physically subdue an attacker who has drawn a knife or gun. Testimony of Hayes, Tr. 234-35. The District presented undisputed evidence of continuous training: reviews at roll call of specific episodes and on-the-job disarmament training. Testimony of Hayes, Tr. 235-36; Testimony of Inspector Spurlock, Tr. 1516, 1529-30; *see also* Testimony of Murphy, Tr. 1942-43 (training provided by the District exceeds that furnished by most other jurisdictions).

In fact the District did not encourage policemen to use bare hands to physically disarm gun- or knife-wielding assailants. In view of the high risks of such activity, it treated martial arts training as supplemental, as providing a resource to be tried only as a last resort if for some reason an officer could not use the threat implicit in his service revolver. Testimony of Hayes. Tr. 234-35. (Had the District emphasized such training, Parker would likely be arguing that it led to the fatal shooting: as a result of such emphasis, Hayes used grappling techniques instead of immediately drawing his revolver and telling Parker to put his hands up.)

Parker's experts evaluated only an incomplete portion of the District's training policy; they never came to grips

with the policy issue of how much to stress hand-to-hand combat; and they provided no basis at all for a judgment that the District's downplaying of such techniques could be reasonably attributed to deliberate indifference to constitutional violations.

5. *Use of Deadly Force.*

The District's policy was to instruct its officers to use deadly force only as a last resort: to save their lives or the lives of innocent persons, or to prevent the escape of a violent felon. Testimony of Inspector Spurlock, Tr. 1513-14; Testimony of Hayes, Tr. 1696-97. Hayes, believing that both his life and Desrine Rainford's were in danger, *id.* at 1806, fired before seeing an actual weapon.

Parker contends that if Hayes had been properly instructed he would have held his fire until he had actually seen a weapon, and his experts so testified. But it is the Supreme Court, not Parker's expert testimony, that defines when a police officer may constitutionally shoot. The Court in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), held that "[w]here [an] officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." It explicitly approved of police department policies that "allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm." *Id.* at 18-19. As the District's policy complies with, and is practically identical to, this standard, the jury was not free to decide that the experts' suggested policy was more to its taste.

Apparently conceding that Parker's attack on the district's "official policy" may be blocked by *Garner*, the majority hints that the jury could have found that the District's *actual* policy was less restrictive than the ap-

parent official one. Maj. Op. at 13. But the facts do not support the hint. The District presented evidence to substantiate its claim that its officers were indoctrinated in its official policy. Testimony of Inspector Spurlock, Tr. 1508-13. Hayes testified that he knew and understood that policy. Tr. 1696-97. Parker introduced no evidence supporting the existence of an alternative "actual" policy.

Of course, the jury could have found that when Hayes fired he could not have reasonably believed that he or Ms. Rainford was in danger. Perhaps it leapt from this to a belief that the District trained its policemen to shoot prematurely. But *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985), plainly forbids the fact-finder to infer a municipal policy from a single action of a non-policy-making employee.

There is a second possibility. Theodore Carr, Assistant Police Chief of the District of Columbia, conducted an official review of Hayes's conduct in the shooting. He determined that Hayes's decision to fire was not justified by the actual danger posed, and he recommended that Hayes be fined and recycled through the firearms training course. Tr. 917-20; Plaintiff's Exhibit 40, 2 Joint Appendix (J.A.) E-4—E-8. Although Chief of Police Turner initially agreed with this assessment of the facts, he later set aside the fine, Tr. 923-24, and Hayes was never put through a firearms retraining program as a consequence of the shooting. *Id.* at 1618. The majority treats the nullification of the fine and failure to retrain as "a telling example" of the inadequacies of the District's discipline and supervision, Maj. Op. at 10, possibly viewing it as evidencing a *de facto* policy in conflict with the official one.

With all respect, the episode tells very little. The department's reprieve appears to have turned on an analysis of Hayes's statements as to what he perceived. *See*

Plaintiff's Exhibit 40, 2 J.A. E-4—E-8. Carr and Turner, as reasonable students of the record, could have reached different appraisals.

Of course one can imagine police conduct so egregious that superiors' complaisance could at least be powerful evidence of a preexisting policy. *See Kibbe v. City of Springfield*, 777 F.2d 801, 806 (1st Cir. 1985), *cert. granted*, 475 U.S. 1064 (1986), *cert. dismissed*, 107 S. Ct. 1114 (1987); *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 1369 (1987). But this is plainly no such case. It is true that to find a violation of Parker's Fourth Amendment rights, the jury had to conclude that Parker was the victim of an unreasonable seizure. But the jury's exoneration of the District on the assault and battery claim entailed the opposite finding—that Hayes had not used unreasonable force under the circumstances. Jury Instructions, Tr. 2220. In response to the district's motion for J.N.O.V., the district court sought to reconcile these findings by suggesting that the jury might have found the shooting unreasonable in an absolute sense, but Hayes's actions reasonable given his lack of adequate training. *Parker v. Hayes*, C.A. No. 83-3382 (D.D.C. Jan. 29, 1987) (Mem. Op.) at 6-7 n.5. Whatever credence one may give this imaginative reconstruction,[3] it seems plain that the

[3] The court's refusal to grant a judgment N.O.V. based on the inconsistency of the jury's verdicts is not before us as an independent claim of error, but it seems plain that the district court's attempted reconcilation presupposes far more refined notions of tort law than exist. While a police officer may be judged as "a reasonable police officer" rather than as a "reasonable person," there is simply no precedent for use of an ultra-subjective standard considering "a reasonable police officer with the specific amount of training this officer received." In any event, it seems fanciful to believe that the jury would, without aid from court or counsel, invent this distinction between § 1983 and common law liability standards. In fact, so far as reasonableness was concerned, the jury instructions for assault and battery were almost identical

jury did not regard Hayes's conduct as so egregious that it could infer deliberate indifference from the District's ultimate judgment call that he should not be penalized. As the jury clearly did not regard it as obvious that Hayes had used unreasonable force, his chiefs' similar judgment cannot be evidence of a preexisting policy of countenancing constitutional violations.

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to those tendered for the § 1983 claim. *Compare* Tr. 2220 ("If you find that the use of that force used by Officer Hayes was unreasonable or excessive under the circumstances, you shall find the District of Columbia liable for assault and battery") with Tr. 2223 (to establish a constitutional violation on which to base his § 1983 claim, Parker must prove that he was injured "as a result of the unnecessary and unreasonable use of force by Officer Hayes"). Whatever affirmative defense Hayes's lack of training might have afforded on the common law claim, no such theory was argued and no instruction to that effect was tendered to the jury.

In its opinion, the district court attempts to distinguish this case from *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). *See* Mem. Op. at 5-6. With all due respect, in so far as *Heller* is relevant to this case, it is on all fours. In *Heller*, also a § 1983 case, a jury had found the defendant police officer's actions not unreasonable and the officer not liable in the first half of a bifurcated trial. As the jury's finding eliminated the requisite constitutional infraction, the district court dismissed the action against the municipality as well and canceled the second half of the proceedings. The court of appeals reversed, holding that the verdict in favor of the policeman did not preclude a verdict against the city on an inadequate training theory. *Heller v. Bushey*, 759 F.2d 1371 1373-74 (9th Cir. 1985). It found, in an argument almost identical to that made by the district court here, "that the jury could have believed that [the policeman], having followed Police Department regulations, was entitled in substance to a defense of good faith." *Id.* at 1373. The Supreme Court, on appeal, disagreed. Because the jury was not charged on any good faith affirmative defense theory, the court of appeals could not employ such a theory to discount the verdict of exoneration. *City of Los Angeles v. Heller*, 475 U.S. at 798-99.

Running a police department raises a variety of hard policy issues. The District may not have resolved each of these perfectly. But even if we assume training errors and a sufficient causal link between them and Parker's injury, there is simply no evidence—from a pattern of excessive constitutional violations or anything else—from which a jury could reasonably infer that its decisions reflected deliberate indifference to increased risks of such violations. The judgment N.O.V. ought to have been granted.

Even if there were sufficient evidence, the district court's failure to give the properly requested *Garner* charge was error and would require remand for a new trial.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 83-3382

DONALD R. PARKER, *et al.*,
Plaintiffs,

v.

WILLIAM HAYES, *et al.*,
Defendants.

ORDER

Before the Court is the defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a set-off of the $39,205.72 cost of D.C. General Hospital treatment for the injured plaintiff. For the reasons set forth below, the defendant's motion is denied.

I. Background

On November 14, 1983, Donald R. Parker and his wife, Betty Parker, brought suit in this Court against the District of Columbia and two District of Columbia police officers, William Hayes and Ronald Motley. In their complaint the Parkers sought compensatory and punitive damages against the defendants for injuries resulting from an altercation with District of Columbia police officers near the plaintiffs' home in Prince Georges County, Maryland. The plaintiffs asserted a variety of legal claims, ranging from constitutional and statutory civil rights violations to assault and battery, negligence, and loss of consortium.

Prior to trial, plaintiffs dismissed all claims against the two individual officers,[1] and before submission to the jury,

[1] Unless otherwise stated and for ease of reference henceforth, "defendant" refers to the District of Columbia and "plaintiff" refers to Donald R. Parker.

further dismissed the claims alleging negligence on the part of the District of Columbia and claims for punitive damages.

Subsequently, after extensive pretrial discovery, a jury was impaneled and the matter went to trial against the District of Columbia only. At the conclusion of plaintiffs' case-in-chief and again renewed at close of all the evidence, the defendant moved for directed verdicts.[2] Those motions were denied and the case was submitted to the jury on two counts: a state law assault and battery claim and a federal civil rights claim. The jury found in favor of the District of Columbia on the state law claim, but against the defendant on the civil rights claim, brought under 42 U.S.C. § 1983, awarding Donald Parker $425,046.67 in compensatory damages and Betty Parker $1.00 in nominal damages for loss of consortium.

The District of Columbia now argues that "since the jury found that Officer Hayes did not use unreasonable force against Don Parker [as to Count I (the state law assault and battery claim)], there is no violation of a constitutional right which is redressable under § 1983 [as a matter of law]." Defendant's Motion for Judgment NOV at 3. In short, the defendant contends that the jury's finding on Count I precludes a judgment against the defendant on Count II. Since the police officer involved in the altercation was found not to have acted with unreasonable and excessive force, the defendant argues, then the District of Columbia cannot be guilty of a constitutional violation and cannot, in that absence, make out a valid section 1983 claim.

Further, the defendant contends even if the verdict on Count I is not ground for judgment NOV on Count II, the

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[2] The District of Columbia principally argued that Officer Hayes did not act unreasonably or with excessive force in shooting Donald Parker and instead acted either in self-defense or in defense of others; and that plaintiffs had not proven that a District of Columbia policy or custom was the moving force that caused the alleged violation of plaintiffs' right to due process of law.

jury verdict must be reversed as a matter of law because the plaintiffs have not and cannot meet the requirements for municipal liability under section 1983 as set forth in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) and its progency.[3]

II. Preclusive Effect of Count I

Initially appealing, the defendant's effort to link the jury verdict on Counts I and II cannot withstand analysis. The District of Columbia begins by asserting that the "jury's verdict as to assault . . . precludes any finding of a constitutional violation":

> In order for the jury to properly have found a constitutional violation *under the facts of this case*, they would have been obliged to find that Officer Hayes used unreasonable force in shooting Parker. The jury made an express finding to the contrary, that Officer Hayes did not use excessive force. Under the current status of § 1983 law, a policy cannot be deemed "unconstitutional" absent an affirmative *unconstitutional* act. The Supreme Court reaffirmed that not every instance of unreasonable force rises to the level of a constitutional violation. Therefore, reasonable force cannot create the constitutional violation necessary to satisfy section 1983.

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[3] In addition to the arguments summarized above, the defendant reiterates its contention that the plaintiffs' "§ 1983 claim should not lie where there exists an adequate remedy at common law . . . [citing *Parratt v. Taylor*, 451 U.S. 527 (1981)]." Defendant's Motion for Judgment NOV at 10 n.3. This claim has been addressed previously, *see* Order of September 6, 1985 at 3, and need not be discussed again here. During the course of the trial the plaintiffs held steadfastly to their position that the defendant had violated a right to *substantive* due process, not *procedural* due process. *See generally Bell v. Wolfish*, 441 U.S. 520 (1979); *Rochin v. California*, 342 U.S. 165 (1952); *Hall v. Tawney*, 621 F.2d 607 (6th Cir. 1980).

Defendant's Motion for Judgment NOV at 10 (emphasis in original) (citations omitted).

It is well established that consistency in general verdicts is not required. *Dunn v. United States*, 284 U.S. 390, 393-94 (1932) ("[t]hat the verdict may have been the result of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters"); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973). The Supreme Court's 1943 look at this issue applies with similar vitality. *United States v. Dotterweich*, 320 U.S. 277, 279.

> Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such motives or vagaries.

Inconsistent general verdicts may be upheld provided there is evidence to support the finding reached by the jury. There being ample support in the record here to support the jury's verdict on the section 1983 claim, the mere possibility of contradiction in the two verdicts in not a basis for overturning either verdict.[4]

The defendant relies heavily on a recent Supreme Court decision, *City of Los Angeles v. Heller*, 106 S. Ct. 1571 (1986), to argue for a different conclusion. In *Heller* the district court held a bifurcated trial on a section 1983 claim brought against a police officer and a municipality, trying first the constitutional claim against the individual police officer. The jury rendered a verdict in favor of the officer, concluding that no constitutional rights had been violated. Because the constitutional claim against the officer formed the legal basis

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[4] It should not be overlooked that even assuming *arguendo* that the jury's verdicts are inconsistent, the District of Columbia failed to make its objection prior to discharge of the jury, when remedy was still possible, waiving thereby any later objection. *See, e.g., Dickerson v. Pritchard*, 706 F.2d 259 (7th Cir. 1983).

for the constitutional claim against the city, the district court correctly concluded that the verdict in favor of the officer required that the suit against the city could not proceed to trial. In short, in that case, the initial—and only—verdict in favor of the individual on the section 1983 constitutional claim precluded a finding of liability against the city on the same constitutional claim.

Unlike *Heller,* our case involves two general verdicts rendered simultaneously. Count I is dissimilar to the verdict issued in *Heller* for it involves a wholly separate and independent *state* claim. The jury's verdict on the constitutional claim here is not dependent on the first claim because the jury was not asked in Count I to make *any* determination as to whether a constitutional violation had occurred. While the conclusion reached on the single verdict in *Heller* was necessarily conclusive as to both the officer and the city, *see Heller,* 106 S. Ct. at 1573 ("[the city was] sued only because [it was] thought legally responsible for the [officer's] action; if the latter inflicted no constitutional injury on [the plaintiff], it is inconceivable that [the city] could be liable"), here Officer Hayes clearly could have been found by the jury not to have breached a reasonable man standard for assault and battery but nevertheless his employer could appropriately, by a preponderance of the evidence, have been found to have deprived the plaintiff of a constitutional right.[5]

[5] That is, the jury possibly sympathetic to an individual's dilemma in the dramatic tension recounted could have found when examining *only* Officer Hayes' actions that his conduct was not unreasonable given the particular conditions at the time of the shooting, his attested and supported assertion of self defense, and his own lack of training. When assessing the culpability of the District of Columbia, however, the jury could reasonably have found that the shooting was symptomatic of a city policy that was deliberately indifferent to the use of excessive force, and hence constituted a constitutional violation when judged against the standard for officers properly trained in extra-jurisdictional emergencies. In short, activity that might not seem "shocking" when evaluated against the expectations one might hold for an untrained officer, could well appear "shocking" when evaluated against a standard of training and safety that the jury could have concluded the municipality reasonably should have provided.

The defendant's "preclusion" argument is further undercut by its concession in its reply memorandum that, contrary to what appeared to be earlier assertions in the motion for judgment NOV,[6] the state law claim is not inconsistent with the Section 1983 claim:

> Contrary to plaintiff's understanding, defendant has made no argument with regard to any inconsistency of the verdict in this case. Defendant has rather asked the Court to grant a judgment notwithstanding the verdict on count II because defendants are entitled to such a judgment *as a matter of law.*

Reply Memorandum at 1 (emphasis in original).

Although the position taken in the reply memorandum is therefore murky, it suggests that the defendant now believes that the verdicts should not be upheld "as a matter of law" either because the plaintiffs failed to offer sufficient evidence to support the verdict against the District of Columbia reached on Count II, *see Borel,* 493 F.2d at 1094, or because the *Monell* requirements for municipal liability have not and cannot be met. The latter question is addressed in part III *infra.* Only the former issue—sufficiency of the evidence—remains to be addressed within the context of the defendant's "preclusion" argument.

When deciding a motion for judgment NOV, "the jury's verdict must stand unless 'the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict.' " *Murphy v. United States,* 653 F.2d 637, 640 (D.C. Cir. 1981), *quoted in Carter v. Duncan-Huggins, Ltd.,* 727 F.2d 1225,

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[6] "It is clear that since the jury found that Officer Hayes did not use unreasonable force against Don Parker, there is no violation of a constitutional right which is redressable under § 1983. . . . In light of that finding, . . . it is clear that the jury cannot award damages for the injury sustained as a result of the shooting since the shooting, in their minds, was justified." Motion of Defendant for Judgment NOV at 3.

1227 (D.C. Cir. 1984). A motion for judgment NOV will be denied unless

> 'there can be but one reasonable conclusion' drawn from the evidence viewed 'in the light most favorable to the plaintiffs . . ., giving them the advantage of every fair and reasonable inference that the evidence may justify.'

MetroCare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922, 924-25 (D.C. Cir. 1982), *quoting Foster v. Maryland State Savings and Loan Ass'n*, 590 F.2d 928, 930 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979).

The jury was instructed that in order to find a violation of section 1983, it must conclude that "the District of Columbia failed adequately to train, supervise and discipline" and that this failure constitutes gross recklessness and gross indifference to the civil rights of Mr. Parker . . . ." [Sic] Prior to submission to the jury of Count II, the Court ruled affirmatively on the sufficiency of plaintiffs' evidence. A review of this matter, in consideration of the instant motion, reaffirms those rulings.

Here it is clear that the evidence submitted at trial was neither "so one-sided" as to preclude disagreement between reasonable men nor so overwhelming as to permit "but one reasonable conclusion." Two witnesses, Charles Bates and Roy McLaren, testifying as experts on police procedures, stated that the Repeat Offender Project (ROP) to which Officer Hayes was assigned suffered from specific and serious training inadequacies. William Brownlee, an expert in forensic pathology, testified that the gunshot wounds on Parker's body indicated that Officer Hayes had a clear, frontal view of Parker at the time he shot. While Hayes testified to his belief that Parker was armed at the time, other evidence could reasonably have lead a juror to conclude that Parker (who was unarmed) was the victim of excessive force. Officer Hayes himself testified that he received little in the way of disarmament training, and an internal memorandum

revealed that the reviewing representatives in the police department concluded that the shooting was unjustified. Additional expert testimony indicated that Officer Hayes' unit received no training in arrest authority and no clear supervision or training on the proper manner for handling extra-jurisdictional arrests. Given the obvious potential risk of death, or serious bodily injury to the public that could arise from lack of supervision and control in the field, joined with the policy instruction to the officer to be "innovative", and further given the police department's ultimate decision to rescind punishment of Hayes for his shooting of Parker, a fact known to the jury, it cannot be said unreasonable for the jury to conclude that the District of Columbia's inadequate ROP training and supervision policy was grossly reckless and/or grossly indifferent to the constitutional rights of the plaintiff.

III. The Monell Requirements for Municipal Liability

In *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, the Supreme Court ruled that a municipality could be sued under 42 U.S.C. § 1983 provided that it was the "execution of a government's policy or custom" that was responsible for inflicting the constitutional injury:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694. Summarized briefly, to find municipal liability *Monell* requires that there be (1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff to be subjected to a deprivation of a constitutional right. *Id.; Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985).

The defendant now argues that the verdict on Count II must be overturned because the plaintiffs have not, and cannot, satisfy any of those four requirements.

A. The District's Policymaker

At trial the plaintiffs introduced evidence that Inspector Edward J. Spurlock organized the squad unit to which Officer Hayes belonged. Spurlock testified that Police Chief Maurice Turner gave him full authority to organize, staff and train the officers in Hayes' unit. The defendant contends that these individuals do not constitute "policymakers" for purposes of the *Monell* analysis:

> Plaintiff has made no showing that a city policymaker, i.e., here the Mayor or the City Council, was the "person" who, acting for the District of Columbia, caused plaintiff to be subjected to the alleged violation of his constitutional right.

Defendant's Motion for Judgment NOV at 12.

Since the defendant filed its motion for judgment NOV the Supreme Court has directly addressed the question of who may constitute a policymaker under *Monell*. In *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986), the Court ruled that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level":

> *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell, supra*, 436 U.S. at 694, 98 S. Ct. at 2037-2038, and whose decisions therefore may give rise to municipal liability under § 1983.

Id. at 1298-99. Municipal liability "attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered," *id.* at 1299, but the authority to make municipal policy "may be delegated by an official who possesses such authority." *Id.*

at 1300. Applying this standard to the facts before it, the Court concluded that a county prosecutor had been delegated final authority over county police actions sufficient to find the county liable under section 1983.

Here, uncontested evidence was presented that Chief Turner gave Inspector Spurlock full authority to organize, design, and set policy for the ROP squad. The power to delegate this authority over Hayes' squad stemmed in the first instance from the plenary power accorded Chief Turner by the Mayor for the purpose of operating the police department. The delegation that occurred here is not unlike that in *Pembaur*. Under the circumstances the jury could have legitimately concluded that Inspector Spurlock exercised final authority over ROP squad policy in a manner that "may fairly be said to represent official policy." *Monell*, 436 U.S. at 694.

B. **Establishment of a Legally Sufficient Municipal Policy**

The defendant contends that "in light of *Monell* and post-*Monell* decisions, plaintiff must allege and prove that the actions of the individual police officers were taken as a result of an unconstitutional policy or from a systematic pattern or failure on the part of the District of Columbia to promulgate appropriate training." Defendant's Motion for Judgment NOV at 13-14. In this instance, the defendant argues, "The expert testimony offered by plaintiffs in no way satisfied the burden of proof required to support an allegation of constitutional deprivation as the result of custom or policy . . . . Mr. Parker cannot show a pattern of similar incidents, by Hayes or other officers, nor can he show that there was a pattern of gross or reckless disregard of rights by Officer Hayes or others, such that the City may be held liable under § 1983." In the defendant's view, the Supreme Court's recent decision in *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985), requires that the plaintiff establish that the constitutional injury resulted from more than a single incident, that the city's policy itself is unconstitutional,

and that the municipal policy evinces a *conscious* or *deliberate* lack of concern for the rights of the plaintiffs and other similarly situated individuals. The defendant reasons that at maximum the District of Columbia's police training policy demonstrated that the District was guilty of unintentional negligence, not conscious or deliberate indifference.

When read in conjunction with other recent case law, *Tuttle* does not support the defendant's position. The *Tuttle* Court reversed the trial court's finding of municipal liability not because the plaintiff established only a single incident of excessive force by a police officer, but because the trial court's instruction permitted the jury to find the city liable "without submitting proof of a single action taken by a muncipal policymaker." In short, the jury was instructed that it could find municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. In the absence of direct proof of such a connection between a policymaker and the activity, the Court concluded that considerably more evidence was needed than the existence of a single incident to establish the required causal link.

> . . . where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Tuttle, 105 S. Ct. at 2436 (footnotes omitted).

In *Pembaur* the Supreme Court effectively limited the scope of the *Tuttle* ruling by adding that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances":

> No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.

Pembaur, 106 S. Ct. at 1298.

Regardless whether one reads *Tuttle* expansively or interprets *Pembaur* as limiting the scope of applicability of the "single incident" language in *Tuttle*, the plaintiffs in this case submitted more than sufficient evidence to satisfy the requirements. This Court specifically instructed the jury that it could not find inadequate training based on a single incident of unreasonable force. The shooting of plaintiff Parker, which the plaintiffs' experts linked directly to the inadequate level of training given to ROP officers, was not the sole evidence for a jury to find "deliberate indifference." Additionally, there was evidence of the frequency with which ROP members had to confront potential arrestees in and out of the District and, in particular, the attempts to effect extra-jurisdictional arrest [sic] in the face of confusing advice. Here, the plaintiffs demonstrated through evidence that final decisionmaking authority was delegated from the Mayor, through the police chief, to Inspector Spurlock as director of the ROP unit, and that police officers in the ROP unit received "next to nothing" in disarmament tactics and extra-jurisdictional arrest procedures. There was also testimony as to the relative ease and inexpense involved in producing appropriate police instruction. The plaintiffs further submitted evidence indicating the District of Columbia was aware that without adequate training one of its officers (Hayes) had acted in a manner considered unjustified by the investigatory police unit yet consciously elected, through the police chief, to override that determination and not take substantive remedial or punitive action on behalf of the ROP unit or the officer, respectively. The jury reasonably could have concluded from this "ratification" evidence that the city maintained a policy of "conscious disregard" for the training of its officers and the rights of its citizens. In short, the jury had more than a "single incident" upon which to base its verdict against the District of Columbia.

Indeed, the evidence offered at trial to establish a municipal policy of deliberate indifference was not unlike that

used to establish a similar policy in *Grandstaff v. City of Borger*, 767 F.2d 161, and in *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986). In *Grandstaff*, the Fifth Circuit concluded that "the disposition" of the policymaker could be inferred from actions taken (or not taken) after the incident of policy [sic] misconduct occurred:

> . . . Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things were done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made.
>
> This reaction to so gross an abuse of the use of deadly weapons says more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of deadly force, after August 11 was evidence of his disposition prior to August 11. . . .
>
> . . . If the police chief had not known and approved of [the dangerous recklessness] beforehand, we would expect a change when he, too, learned the facts. But there is no sign of any concern except that the City avoid liability. The jury was entitled to infer that the conduct on the 6666 Ranch demonstrated the policy of the Borger city police force as approved by its policymaker. . . .

767 F.2d at 171-172. In *Fiacco*, 783 F.2d at 326, the Second Circuit ruled that the plaintiff had properly supported a claim of "deliberate indifference" by offering evidence which pur-

ported to show that the defendant city had failed to exercise reasonable care in investigating claims of police brutality:

> [Fiacco's theory] is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis, and we reject the motion [sic] advanced by the City defendants that a municipality may not be held liable under § 1983 on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain.

In each of these cases the jury was allowed to find against the defendant municipality on the basis of evidence of a single decision by a municipal policymaker not to exercise reasonable care[7] after an incident of constitutional deprivation had occurred. In short, these cases support the interpretation of *Tuttle* noted above. Here, the jury was entitled to conclude from the "ratification evidence" and other evidence noted above that, even in the absence of multiple incidents of constitutional deprivation, the District of Columbia maintained a policy of "deliberate indifference" for which it could be liable.

In addition to the "multiple incident" argument, the defendant challenges the legal sufficiency of the jury's verdict on Count II by arguing that a policy not itself unconstitutional can never provide a basis for § 1983 liability. This argument was analyzed at length in *Fiaccio* [sic] and rejected:

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[7] Police Chief Turner's decision to rescind the reprimand of Officer Hayes was expressly stated to be a "final action." As such it clearly established District of Columbia policy within the meaning of *Pembaur*, and could, under appropriate circumstances, expose the District of Columbia to liability under § 1983. *See generally, Pembaur*, 106 S. Ct. at 1289-99.

Nor are we persuaded by the City defendants' suggestion that a municipal policy that is not itself unconstitutional but that merely permits or tolerates unconstitutional acts by city employees cannot be the basis for municipal liability under § 1983. For this argument the City defendants rely on a footnote in the plurality opinion in *Tuttle*, in which four Justices "express[ed] no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Id.* at 2436 n.7. Notwithstanding this reservation of view, we think the text of the plurality opinion implies that a policy that is not itself unconstitutional may provide the basis for municipal liability. The question resolved in *Tuttle* was whether the existence of a policy could be inferred solely from evidence of the occurrence of a single incident, and the Court held that more evidence was required. In reaching this conclusion, the plurality opinion noted the plaintiff's contention that there was in the record additional evidence of an official policy of inadequate training but stated that "unfortunately for [plaintiff]," the court had instructed the jury that it could infer the existence of such a policy solely from evidence of the occurrence of the single incident, without any additional evidence. *Id.* at 2435. The implication of the word "unfortunately" would seem to be that if the jury had not been allowed to infer the existence of the alleged policy—itself not unconstitutional—solely from the occurrence of the single incident, the four Justices who joined this opinion would have upheld the judgment in favor of the plaintiff. Further, in emphasizing that proof of the occurrence of a single incident is not sufficient to establish the existence of an official policy, the plurality opinion went on to state that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish . . . the requisite fault on the part of the municipality . . . ." *Id.* at 2436 (footnote 7 omitted). The concurring opinion in *Tuttle* indicates that three other Justices would have

upheld the judgment for the plaintiff if it had been clear that the jury's finding that there was a policy of inadequate training was based at least in part on the other evidence and not just on the evidence of the occurrence of the single incident there at issue. *See id.* at 2438 (Brennan, *J.*, concurring). Thus, notwithstanding the plurality's reservation, it is difficult to conclude that the Court would rule that, as a matter of law, a policy that is not itself unconstitutional may not be a premise for municipal liability under § 1983.

Nor do we think there is a sound basis for a rule of law that would preclude the premising of municipal liability under § 1983 on any policy that is not itself unconstitutional. A municipality that has the responsibility to keep order and to protect the rights of those within its boundaries to be free from physical violence gives its policemen considerable power to subdue persons who would violate those rights. It cannot responsibly condone police officers' use of the power in a way that is itself lawless. It should not take a laissez-faire attitude toward the violation by its peace officers of the very rights they are supposed to prevent others from violating. A principle that would give a municipality immunity from § 1983 liability for injury caused by its deliberate indifference to its police officers' use of excessive force in violation of constitutional principles would foster the denial—both by policemen and by civilians—of the very rights the city is responsible for safeguarding.

783 F.2d at 326-27. This Court finds the analysis persuasive and, accordingly, adopts it for purposes of this case.

C. Proof of Causation

Finally, the District of Columbia contends that the plaintiffs' evidence was insufficient to show that the inadequate training of members of the ROP unit was the "moving force behind" the constitutional injury that plaintiff Donald R. Parker suffered. As discussed *supra*, the evidence provided a clear and reasonable basis upon which a juror could reasonably conclude that lack of training was reponsible for

the incident on Bock Road. The plaintiffs' experts testified that ROP members received inadequate training in disarmament and extra-jurisdictional arrest procedures. One expert testified that Officer Hayes had sufficient time to see that plaintiff Parker was warned before discharging his weapon. As noted above, the jury logically could have concluded that Officer Hayes acted reasonably given his lack of training (and therefore was not accountable on the assault and battery count), but that had he received adequate training the shooting on Bock Road would not have occurred. This Court told the jury that:

> At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. The policy must be the moving force behind the alleged constitutional violation.

If the jury accepted the evidence in the record and evaluated as credible the testimony of plaintiffs' experts, then the verdict on Count II is wholly consistent with the plaintiffs' contention that the District of Columbia's policy of deliberate indifference "caused" the constitutional deprivation.

IV.

Accordingly, for the reasons set forth above the defendant's motion for judgment NOV is denied.

Insofar as the District of Columbia has not previously sought set-off, nor requested a reduction from the jury to cover medical bills, nor offered any evidence to suggest that Donald R. Parker will evade his debts for medical care, the defendant's alternative request for a set-off is denied.

IT IS SO ORDERED.

/s/ Joyce Hens Green

JOYCE HENS GREEN
United States District Judge

JANUARY 29, 1987

[FILED JANUARY 29, 1987]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

DISTRICT OF COLUMBIA, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA and WILLIAMS, *Circuit Judges*, and GORDON*, *Senior District Judge*, U.S. District Court for the Eastern District of Wisconsin.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: JUNE 17, 1988
Opinion for the Court filed by Senior District Judge Gordon.
Dissenting opinion filed by Circuit Judge Williams.
*Sitting by designation pursuant to 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

WILLIAM HAYES, *et al.*
DISTRICT OF COLUMBIA, *Appellant*

Before: MIKVA and WILLIAMS, *Circuit Judges,* and MYRON L. GORDON*, *Senior U. S. District Judge.*

ORDER

Upon consideration of appellant's Petition for Rehearing, filed July 18, 1988 it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing.

*of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S. [C.] § 294(d).

[FILED: AUGUST 18, 1988]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

No. 87-7039

DONALD R. PARKER, *et al.*

v.

WILLIAM HAYES, *et al.*
DISTRICT OF COLUMBIA, *Appellant*

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*.

ORDER

Appellant's Suggestion for Rehearing *En Banc* has been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

Per Curiam
For The Court

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Starr, Silberman, Buckley, Williams and Sentelle would grant the suggestion for rehearing *en banc*.

Circuit Judge D. H. Ginsburg did not participate in this order.

[FILED: AUGUST 18, 1988]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 83-3382

DONALD R. PARKER AND BETTY PARKER,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

JUDGMENT ON THE VERDICT

This cause having been tried by the Court and a Jury, before the Honorable Joyce Hens Green, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the Jury found that the [sic] Officer Hayes did not use unreasonable and excessive force against Don Parker on the plaintiff's claim of Assault and Battery,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Jury found that the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law on the plaintiff's claim of Violation of Constitutional Rights — Due Process,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Jury awarded the plaintiff Don Parker the sum of Four Hundred Twenty-five Thousand Forty-six Dollars and Sixty-seven Cents ($425,046.67) on the afore named findings of the jury,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the jury found that Betty Parker did not

sustain any loss of consortium as a result of the injuries to Don Parker on the plaintiff's claim of Loss of Consortium — Betty Parker,

AND IT FURTHER ORDERED, ADJUDGED AND DECREED that the Jury awarded the plaintiff Betty Parker the sum of One Dollar ($1.00) on the afore named findings of the jury.

JAMES F. DAVEY, *Clerk*

/s/ BY: Joe A. Wood, Jr. Oct. 3, 1985
Deputy Clerk

APPROVED: /s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

OCTOBER 3, 1985

[FILED: OCTOBER 3, 1985]

No. 88-810

Supreme Court, U.S.
FILED
JAN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM W. TAYLOR, III *
ROGER E. ZUCKERMAN
CHRISTINE NICHOLSON
BLAIR G. BROWN
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it declined to instruct the jury that a police officer may use deadly force to apprehend a person suspected of a crime of violence when the instruction had no application to the evidence in this case and did not in any event accurately reflect the holding of *Tennessee v. Garner*, 471 U.S. 1 (1985).

2. Whether the District of Columbia preserved, under Federal Rule of Civil Procedure 51, its objection to the trial court's refusal to give its proposed instruction purportedly based upon *Garner*, and whether this Court should review the application of Rule 51 by the Court of Appeals.

3. Whether this Court should review the sufficiency of the evidence supporting the verdict, where the trial and appellate courts have reviewed that evidence four times and found it ample, where the legal foundation for that verdict is entirely consistent with this Court's decisions in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and where the District of Columbia did not object to jury instructions based upon those decisions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-810

DISTRICT OF COLUMBIA,

Petitioner,

v.

DONALD R. PARKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Donald R. Parker respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in this case. That opinion is reported at 850 F.2d 708 (D.C. Cir. 1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of . . . the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . ."

STATEMENT OF THE CASE

Introduction

As the Court of Appeals observed, this was a "fact-bound case" [Appendix to Petition for Writ of Certiorari (App.) at 13a]. Petitioner District of Columbia persists here, as it did in the Court of Appeals, in relying largely upon its own evidence. It repeatedly characterizes its evidence as "uncontradicted"[1] when the contrary is true and dismisses or ignores vast portions of the record.[2] Respondent fundamentally disagrees, as did the trial judge, and two of the three judges on the appellate panel, with petitioner's suggestion that the jury was erroneously induced to apply a standard for the use of deadly force inconsistent with applicable law. To the contrary, the jury was clearly and rigorously instructed on Parker's burden to establish that he was injured by the use of deadly force unreasonable under the circumstances and that the District of Columbia was directly and not vicariously responsible. The evidence, viewed in the appropriate perspective of the plaintiff, provides an overwhelming basis for the conclusion that Parker met that burden.

The Facts

On November 15, 1982, William Hayes fired four shots at Donald Parker from a distance of ten to fifteen feet. Two of the shots entered Parker's body and one lodged in the spine, paralyzing him from the waist down. Parker

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[1] *E.g.*, Petition for Writ of Certiorari (Petition) at 5, 6, and 27.

[2] *See, e.g.*, the trial assistant's clear statement to the trial judge that the District of Columbia was not relying on the "fleeing felon" rule to justify the shooting. (Tr. 1488-89, discussed *infra* at 20.)

was unarmed and his arms were upraised. Both hands were visible. (Tr. 218, 1288-89, 1303-05.)

Hayes claimed he shot Parker because he believed Parker was armed at the time he fired and that Parker was about to shoot him. Parker was not fleeing at the time of the shooting, and neither Hayes nor the District of Columbia defended the shooting as necessary to prevent Parker's flight.[3]

The shooting occurred on a suburban road in Prince George's County, Maryland. Hayes, and his partner Ronald Motley, were members of a recently created unit of the District of Columbia Metropolitan Police Department called the Repeat Offender Project, or "ROP" unit. They had been dispatched to the area by the ROP unit to locate and apprehend Parker, who was the subject of a District of Columbia arrest warrant for armed robbery.[4]

Parker filed suit against the District of Columbia alleging that it had violated his constitutional rights and was liable for the resulting damage under 42 U.S.C. § 1983. At trial, he presented an array of testimonial and documentary evidence dealing with the creation and operation of the ROP unit, training, supervision, control, and discipline of its members, including officer Hayes, and the events of the day of the shooting.

The evidence demonstrated that the District of Columbia created the ROP unit, selected its members, and sent them on missions with full awareness that ROP members would encounter citizens in situations with a high likelihood of volatility. The evidence also demonstrated that the District of Columbia provided woefully inadequate tools for handling these situations, which present danger to officer and citizen alike, and which are highly predictable but confusing to the ordinary officer. It com-

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[3] *See* discussion, *infra* at 19-20.

[4] All charges against Parker were later dismissed when four witnesses to the robbery failed to identify him (Tr. 930-34).

pounded the inevitability of violence by imbuing the ROP squad members with the notion that they were not to seek guidance when they encountered difficult situations, but were to *ad lib* their responses to meet their objective. The jury was amply justified in concluding that the District of Columbia was responsible for Parker's injuries.

Two acknowledged experts in matters of police administration and practice, particularly as regards proper training, procedures, and control in volatile extra-jurisdictional investigations, explained why that was so. One was Roy C. McLaren, former Director of Field Operations for the International Association of Chiefs of Police, Chief of Police for Arlington County, Virginia, member of the Police Chiefs Steering Committee for the Washington Metropolitan Area, Director of the Law Enforcement Standards Division of the Police Executive Research Forum, and coauthor (with the late Orlando W. Wilson, Superintendent of Police in Chicago) of the landmark treatise, *Police Administration*, perhaps the most widely used book on police management in the United States. (Tr. 665-72.)

Another was Charles W. Bates, a retired 36-year FBI agent formerly in charge of field offices in Omaha, Cleveland, Chicago, and San Francisco, and Assistant Director in charge of criminal investigations at FBI headquarters in Washington, D.C. Bates had made at least 500 arrests during his career, including numerous arrests of armed and dangerous felons. He was responsible for the entire supervision of the 1974 Patricia Hearst kidnapping case. Bates had particular expertise in the area of civil rights violations by local police departments and when it was appropriate for local police to use deadly force. (Tr. 263-79.)

The experts explained, and the jury was entitled to accept, that the ROP squad's "live by your wits" ethic was at odds with the norm for law enforcement conduct. It was especially dangerous when combined with the ROP's

failure to provide its freelancing members with confrontational tools that involved less than deadly force and the failure to instruct members in the normal kinds of non-deadly force and disarmament tactics. The absence of command and control of ROP squad officers in extra-jurisdictional forays, combined with the failure adequately to train them in non-deadly confrontational techniques, was a prescription for and the cause of the very disaster that occurred on November 15, 1982.

The Shooting

On November 15, 1982, Hayes and Motley confronted Parker and his family within their home,[5] claiming to be police officers from the District of Columbia. They had no warrant. Throughout the course of their discussions with Parker and during the events leading up to the shooting, they never told him he was under arrest. They did not know what their authority was. They were unaccompanied by local police. They refused to contact local police and were unable or unwilling to contact their own superiors. They refused the family's requests in all of these regards. (Tr. 434, 435-36, 544, 991.) The officers behaved both boorishly and uncertainly. They alternately threatened and cajoled. They tried to trick Parker into leaving voluntarily. (Tr. 378.) Hayes was menacing, displayed his weapon, and behaved aggressively. Motley was inclined to leave until authority appeared. (Tr. 433, 434, 991-93.) The Parkers, dressed in underwear and night clothes and having two small children at their feet, were frantic.

Frightened and panicked, Parker left his house through the bedroom window and alternately walked and ran through a nearby wooded area, followed by Motley. He

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[5] Hayes and Motley contended they had been told Parker would not be there because he and his wife were estranged (Tr. 327-28, 1743-44). That was obviously inaccurate information, as was the address they had been given in Washington for Parker's current residence, a shopping mall (Tr. 1743-44).

wanted to go to a neighbor's home to call a lawyer.[6] He decided to get on a public road, where he unexpectedly met Hayes. He tried to enter a vehicle which had rear-ended Hayes' car. According to the driver he screamed, "Help me. These people are trying to kill me." (Tr. 437-41, 888-90.)

Hayes unsuccessfully attempted to pull Parker from the car. With Parker partially out, between the opened door and the body of the car, Hayes backed up and assumed a protective position near the rear of the car. Hayes said to Parker "Freeze, Parker; don't do it." (Tr. 197-200.) Parker attempted to comply.

Overweight, undertrained, outside the command and control of his supervisors in the District of Columbia, uncertain of his arrest authority, incapable of subduing Parker by nondeadly force, unaccompanied by uniformed Maryland officers, Hayes then fired four bullets at Parker from his service revolver, hitting him twice (Tr. 202). Neither Hayes nor Motley had seen Parker in possession of a weapon at any time that day. Parker was in fact unarmed. (Tr. 218.)

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[6] Parker described his conduct as follows:

> THE WITNESS: Yes, Officer Hayes. Officer Hayes kept grabbing his gun, he kept grabbing at his gun. He frightened me with his gun, basically, as far as I'm concerned, and he scared me to the point whereas I went into the bedroom, I told my wife, I say, "I don't know who this fellow is, or these people are." I say, "They don't have a warrant or anything." I say, "I'm getting out of here. I'm getting out of here."
>
> Before I went into the bedroom, I beg Officer Hayes could she, my wife, go and call my lawyer also, before I done that. They refused everything. They refused everything. They wouldn't allow us to do anything. They just simply just came into my house and ramshacked it and took it over.
>
> I went into the bedroom. I told my wife, I say, "I'm scared, sugar, real frightened. I don't know who these guys are, what they are." I say, "I'm going to try to go over to the neighbor's house and call the attorneys. And that's what occurred."

(Tr. 435-36.)

Dr. William Brownlee, formerly the Deputy Medical Examiner and Deputy Coroner for the District of Columbia, testified for Parker. Using photographs and medical records, Dr. Brownlee did a forensic reconstruction of the shooting, including in particular the angle of Parker's body when Hayes fired the shot which lodged at the L-2 level in Parker's spine. Dr. Brownlee testified that when Hayes fired this shot, Parker's arms were in a raised position and that the front of Parker's body was as visible to Hayes, if not more so, than the rear of Parker's body. (Tr. 1304-05.)

The Absence of Supervision, Command and Control

Inspector Edward J. Spurlock, creator and head of the ROP squad, conceded that the practice and custom of the squad was essentially to freelance in the field. Squad members were encouraged to use their wits. They were not expected to check with their superiors upon encountering problems. (Tr. 1633, 1639, 1640.) Spurlock also testified, as had Hayes, and the District conceded throughout trial, that ROP members were expected to operate outside the District of Columbia, where squad members would roam to make surveillances, gather information or make arrests. These were not to be ordinary forays. The ROP squad was intended to target individuals who purportedly were wanted for crimes of violence. The nature of these "targets" gave to every confrontation a potential volatility. (Tr. 1597-1600.)

Chief McLaren testified that in these extra-jurisdictional circumstances, the need for direction, supervision and control of officers in the field was paramount. Freelancing is dangerous. McLaren described in detail the norms that a police department is expected to meet in these circumstances. Officers must have appropriate levels and forms of response that are clearly defined and understood well in advance. They must have clear direction from their superiors and a clear understanding of the extent and limits of their authority. They must be told

when and how they may "detain" and under what circumstances they may "arrest." Precision and clarity are required to avoid confusing the officers and to avoid misunderstanding and confusion on the part of those citizens whom they confront. (Tr. 672-73, 676-84, 727-31.)

McLaren analyzed the sole written guidance provided ROP squad members regarding response levels and authority in extra-jurisdictional confrontations: a single, confusing and poorly written memorandum purporting to describe authority to arrest in Maryland, plaintiff's exhibit 4. Hayes and Motley did not understand it. (Tr. 338-39.) Assistant United States Attorney William Bowman conceded that it was "silent" on the key question of what authority a D.C. officer had to arrest in Maryland for a felony committed out of his presence (Tr. 1341). The memorandum was inadequate as a supervisory tool. It failed to cover extra-jurisdictional "detention" situations, failed to give instructions on the need to maintain contact, failed to give a clear explanation of arrest authority, and failed otherwise clearly to delineate the responsibilities of an officer in the kind of extra-jurisdictional confrontation experienced by Hayes and Motley on November 15, 1982. Oral instructions were not a substitute, in McLaren's view. Only by written guidance through clear manuals does an officer remember what he is told. The norm in police practice—the minimum norm —requires clear and adequate written instructional and supervisory material. The District failed to meet that norm as regards extra-jurisdictional arrest and detention by its ROP squad members. (Tr. 678, 679, 681, 682, 727, 728.)

McLaren's opinions were illustrated by the very testimony of the officers. Officer Motley admitted that he was confused about his authority to arrest or detain Parker. He knew he had "citizen's arrest powers." He just did not know what they were. Nothing in the memorandum, or any other training guide, helped him. (Tr. 315, 316, 338, 339.) Motley and Hayes simply did not know what

to do in the Parker house. They had no command presence, and they never placed Parker under arrest. So far as Hayes was concerned, Parker believed he was free to leave and he was never told not to. (Tr. 1858-60.) By the same token, however, Hayes and Motley felt constrained to follow Parker in menacing and threatening fashion in an effort to do something. It was an absolutely contradictory pattern of response, neither fish nor fowl, in which Parker could not know whether he was detained or free to go.

Moreover, again in violation of the minimum standards for command and control of far-flung police intrusions, neither Hayes nor Motley was ever instructed that, upon encountering a wanted suspect in a far-flung jurisdiction, even if unexpectedly, he must immediately contact local authorities in order to utilize their command authority. McLaren testified that these policies and instructional elements were critical; telephone contact with District of Columbia authorities and with Prince George's authorities should have been made as soon as Parker was identified, from any location nearby. (Tr. 684,731.)

McLaren described the predictable mayhem, the volatility, that such untrained and uncontrolled officers create when they engage in extra-jurisdictional maneuvers. They possess no command presence, create uncertainty and confusion in those whom they attempt to confront, and are themselves uncertain and confused about their proper responses. This volatility is engendered by the "use your wits" credo which the ROP squad substituted for training, command, and control. It results in the predictable panic which Parker felt, the uncertainty and confusion which attended the officers' responses, and the unwieldy and ultimately excessive force to which Parker was subjected. (Tr. 682-84.)

The Absence of Training in Nondeadly Confrontational Techniques

Both experts testified at length about the inadequate training which Officer Hayes received in nondeadly tech-

niques of disarmament and control.[7] Such training was particularly necessary for a ROP squad officer engaged in volatile extra-jurisdictional confrontations.

Hayes himself conceded that he received no more than an hour of training as a police cadet in 1973 in how to disarm dangerous individuals. In fact, that is all the disarmament training he received during the entire 1971-1978 period. (Tr. 231, 233.) Hayes thought so little of the training, which was "less than they taught you in the Air Force," that he characterized it as "next to nothing." (Tr. 231, 233.) After 1978, he received none (Tr. 233-34). After selection to the ROP squad, he received no physical training despite the fact that he had spent virtually all of the preceding five years as a radio dispatcher (Tr. 228-30). He had been on limited duty because of a bout with pericarditis in 1977 and a desire to avoid heavy street duty. Following his admission to the ROP squad in the spring of 1982, Hayes was not required to take any refresher physical training. Hayes had been cited numerous times for being overweight. (Tr. 1624-25.) On July 16, 1982, he fractured his shoulder. He was off duty until September. (Tr. 228-30, 257, 1625.) In this unfit and unprepared condition, Hayes was sent to Maryland to look for Parker. Spurlock conceded that he was aware of Hayes' health problems and general level of fitness when he selected Hayes to the ROP squad (Tr. 1623-24).

Assistant United States Attorney Bowman testified that to his knowledge, physical condition was not a criterion for selection to the ROP squad, but that upon reflection perhaps it should have been. He stated, "I thought that most of the surveillance, frankly, was going to be by car." (Tr. 1334.)

McLaren and Bates both testified that the training and physical preparedness given Hayes by the ROP squad

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[7] Both had reviewed the training materials provided by the District of Columbia and the depositions of Hayes, Motley and Spurlock (Tr. 271, 676).

and the Metropolitan Police Department were inadequate. McLaren described an array of disarming tactics that police officers should reasonably be taught. He described a variety of methods that police departments reasonably should teach their officers for removing individuals from automobiles. McLaren described those methods in detail, including a bar-arm lock, a bar-arm lever, and others. (Tr. 693-94.) These techniques were not taught Hayes, and Hayes did not try to use them. McLaren further testified that the words purportedly spoken by Hayes, including the word "freeze" were inadequate. This command and the other command which Hayes asserted that he spoke ("don't do it") would be understood differently by a person who was unarmed than one who was in fact armed. The unarmed person could be expected to respond as Parker did. Hayes should have ordered Parker to place his hands so that Hayes could see them. This is the correct command to avoid confusion. Nothing in the materials that McLaren reviewed suggested that Hayes or his partner had ever received training in these principles. (Tr. 695, 696.)

Bates testified to the same effect. Hayes was not justified in using deadly force against Parker. Hayes had a substantial size advantage over Parker, and he could have removed Parker from the vehicle without having to fire his weapon. (Tr. 281-82.) Bates gave a demonstration (Tr. 283-84).

Bates also testified that the commands which Hayes gave were imprecise. The command "don't do it" is confusing. The normal reaction for any individual who received the command that Hayes gave would simply have been to turn around, which was what Parker did. (Tr. 286.) Bates also made the point that Hayes could have retreated to take cover behind the automobile, where he had a clear defensive position (Tr. 295).

Bates testified that any law enforcement program that complied with commonly-accepted standards in this country should have taught the particular tactics which he

described. Any acceptable training program should teach those physical disarming tactics as "continual training." (Tr. 282, 285.)[8]

The Refusal to Retrain or Discipline

Uninvolved officers of the District of Columbia Police Department conducted an investigation of the shooting. They reached the same conclusions as Chief McLaren and Agent Bates.

The investigation was conducted principally by Assistant Police Chief Theodore R. Carr. Assistant Chief Carr served as Administrative Services Officer. (Tr. 913.) It was his responsibility to review cases involving police misconduct, to make findings and to recommend punishment (Tr. 914).

Assistant Chief Carr conducted an official review of Hayes' conduct and made written findings (Plaintiff's Exhibit 40):

> In the evidence amassed concerning this incident, including your latest reply to the Notice of Proposed Adverse Action, you make conflicting statements about Mr. Parker's exact position and actions at the time you fired your revolver. Additionally, you make conflicting statements concerning your specific reasons for utilizing deadly force. In your statement of November 15th, 1982, you state that you had no clear view of his hand but that you thought that Parker was trying to shoot you, the woman, or both. Later, in the same statement you state that Mr. Parker was in the process of entering the vehicle when you fired your first shot and that you fired to protect Ms. Rainford from being kidnapped. In your most recent reply, however, you contend that Mr. Parker

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[8] Petitioner erroneously states that the only alternative that Agent Bates offered to the use of deadly force was a "choke hold" of doubtful legality in the District of Columbia. In fact, Bates was quite clear that there were other physical techniques that Hayes should have used to subdue Parker without resort to his weapon. (*See, e.g.*, Tr. 293.)

was fully out of the car when you fired your revolver at him from a distance of 12 to 18 feet.

Further, you contend that you were towards the rear of the vehicle, at the end of the car. You contend that you believed that Mr. Parker was armed due to his actions and body movements during the incident and your previous knowledge of his criminal history. This claim is inconsistent with the fact that you allowed the individual to enter his bedroom unguarded and to remain there for 15 to 20 minutes.

The facts of this case indicate that you had insufficient information that Mr. Parker was armed at the point you utilized your service revolver. If, as you contend, you were towards the rear of the vehicle, you could have taken cover behind it. However, as the evidence indicates that the center post was struck by one of your rounds, you could not have been directly behind the vehicle and had to be at some angle in respect to Mr. Parker, the open door, and Ms. Rainford.

Additionally, as you contend in your reply that Mr. Parker was completely out of the vehicle, at that point he presented no immediate danger to Ms. Rainford. Consequently, with no facts to establish that Mr. Parker was armed and with Ms. Rainford out of immediate danger, the utilization of your service revolver at that instant was unjustified and endangered Ms. Rainford's life.

Conclusion: This officer concludes that a preponderance of the evidence established that you are guilty of the charges and specifications as cited in the Notice of Proposed Adverse Action.

Decision: For the cited violation, you will be fined three days' pay, amounting to a monetary fine of $318.36. The total fine shall be payable in 12 equal payments of $25 each and one final payment of $18.36, beginning on or after the pay period beginning June 24th, 1984, and continuing thereafter each and every pay period until paid in full, provided that in the event of your separation from the force,

> the total amount of the fine then remaining unpaid shall be retained out of any compensation or allowance due or that may thereafter become due, unless otherwise ordered by the Chief of Police. In the event monies are presently being deducted from your salary as a result of a previously imposed fine, the above fine shall be added to the outstanding balance and the current installment shall remain the same.

(Tr. 917-20.)

Assistant Chief Carr then officially notified Spurlock, the head of the ROP Unit that Hayes should be "recycled through the firearms training course so that any—so he can be refreshed in terms of policies and procedures" (Tr. 920). Spurlock received the notice. He declined to have Hayes retrained in any aspect of firearms training and never sent him to any course. He thought Hayes' conduct was justified and not inconsistent with ROP practice and custom. He tried to help Hayes in administrative proceedings before Assistant Chief Carr. (Tr. 1608, 1609, 1618, 1619.)

Chief of Police Maurice Turner affirmed Assistant Chief Carr's factual findings, but he vacated the penalty (Tr. 921-24). Remarkably, Hayes was neither punished nor retrained.

The Civil Rights Claim

Petitioner's request for review urges that the jury was asked to decide whether the District of Columbia's official policy on the use of deadly force caused a constitutional violation. That is not true. The District's official policy with regard to the use of deadly force was never the basis of Parker's constitutional claim under 42 U.S.C. § 1983. Compare *Tennessee v. Garner*, 471 U.S. 1 (1985).

The essence of Parker's civil rights claim was rather that the District deliberately or recklessly pursued a broad course of conduct that resulted in the deprivation

of his constitutional rights.[9] That course of conduct included (1) the creation of a squad of officers with a mission to engage in high volatility confrontations outside the borders of the District of Columbia, while armed and while seeking out purportedly dangerous persons; (2) advising officers to confront these situations by freelancing their way through them, without any significant command and control from central authorities, without local police presence, without contact with senior personnel, without clear instructions on when "arrests" were permissible, when investigative "detention" was permissible, or when neither was appropriate, without instruction as to the value and need for command presence, and without other guidance normally attending significant police operations in far-flung areas; (3) failing to select and train officers physically fit for the anticipated volatile confrontations and physically able to respond by the use of nondeadly force where such techniques are appropriate; and (4) failing thereafter to retrain or discipline (and indeed praising) an officer found to have wrongly utilized deadly force in one such extra-jurisdictional confrontation—the shooting of Parker.

This conduct reflected deliberate indifference in the extreme by the District of Columbia to the risk of constitutional harm—the unreasonable use of deadly force to finish off a predictably volatile and confusing extra-jurisdictional confrontation between an uncertain and unguided ROP officer and a confused and panicked citizen. It was the clear moving force behind Parker's injury.

The District moved for a directed verdict after Parker rested and again at the end of its defense. With regard to Parker's constitutional claim, it argued that the evidence was not sufficient to establish gross negligence and causation. Both motions were denied.

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[9] Parker alleged deprivation of rights secured to him by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution and by 42 U.S.C. § 1983. Amended Complaint at ¶ 1.

The Jury Instructions

The jury was instructed rigorously and at length regarding the elements of Parker's civil rights claim (Tr. 2220-23). Those instructions included the following language:

> First, in order to find for Don Parker on this issue, you would have to find that Mr. Parker proved by a preponderance of the evidence that the training, supervision and discipline program of the metropolitan police department was inadequate and that the alleged inadequacy of the training, supervision, and discipline program resulted from the selected policy or custom of the District of Columbia policymakers.
>
> To find for Mr. Parker, you would have to further find that if there were a policy or custom of the District of Columbia which resulted in inadequate training, supervision or discipline, that there was a constitutional violation of Mr. Parker's civil rights and that there was a link, that is, a causal connection between the policy or custom concerning the training, supervision and discipline and the constitutional civil right of which he contends he was deprived.
>
> Policy in this context shall be defined as a definite course or method of action selected from among alternatives and in the light of conditions to guide and determine present and future decisions.
>
> * * * *
>
> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that the District of Columbia failed adequately to train, supervise and discipline Officers Hayes and Motley and that this failure constitutes gross recklessness and gross indifference to the civil rights of Mr. Parker in that such inadequate training, supervision, and discipline would involve a risk of harm to others.
>
> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that as a result of the inadequate training, instruction and discipline as alleged, Mr. Parker was deprived of his

> civil rights without due process of law, specifically as a result of the unnecessary and unreasonable use of force by Officer Hayes. At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. The policy must be the moving force behind the alleged constitutional violation.
>
> Proof of a single incident of unconstitutional activity is not sufficient to impose liability on the District of Columbia unless proof of the incident includes proof that it was caused by an existing unconstitutional District of Columbia policy or custom which policy or custom can be attributed to a District of Columbia policymaker.

(Tr. 2221-23.)

The Jury Verdict

The jury specifically found "that the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law." It awarded Parker $425,046.67 in damages for the District's violation of 42 U.S.C. 1983. (Tr. 2248-49.) The jury found in favor of the District on Parker's assault and battery claim (Tr. 2248).

The District's motion for judgment notwithstanding the verdict was denied in a reasoned and lengthy opinion (App. 44a-60a).

Affirmance by the Court of Appeals

The District appealed. It again challenged the sufficiency of the evidence as to its conduct and the nexus between that conduct and Parker's injury. The District abandoned on appeal any argument that Inspector Spurlock and Chief Turner were not policymakers and that inadequate training of police officers cannot constitute a policy, practice, or custom under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Instead, it argued that the evidence was not sufficient to establish inadequacies in training, discipline,

or supervision and that any such deficiences were not the cause of Parker's injuries.

The Court of Appeals affirmed the judgment of the district court essentially because it found "ample evidence in the record" to support the jury's finding that the District had a policy, custom, or practice that directly resulted in the deprivation of Parker's constitutional rights without due process of law (App. 8a). The majority further noted that "[o]ur colleague's dissent is primarily based on his own interpretation of the facts, which is contrary to that of the jury" (App. 5a).

The Court of Appeals held, for two reasons, that reversal was not warranted by the trial court's decision not to charge the jury regarding use of deadly force to prevent flight with language purportedly excerpted from *Tennessee v. Garner*. First, it correctly discerned that "[w]hat the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge" (App. 13a) (emphasis in original). Second, the Court determined that the District had failed to preserve an objection on the issue (App. 13a-14a).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Affirmed the District Court's Refusal to Instruct the Jury That a Police Officer May Use Deadly Force to Apprehend a Person Suspected of a Violent Crime Because (a) the Issue Was Not Presented By the Evidence and (b) the Instruction Requested Did Not Accurately Reflect the Holding of *Tennessee v. Garner*

Petitioner seeks review of the Court of Appeals' affirmance of the district court's refusal to give an instruction containing the following language:

> It is also constitutional for an officer to use deadly force in apprehending a suspect if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm if, where feasible, some warning has been given.

(Petition at 9 n.5.) It urges that failure to give this instruction constitutes reversible error because the Court failed to advise the jury of the full range of occasions upon which an officer may constitutionally use deadly force against an unarmed citizen, relying particularly upon this Court's decision in *Garner*.

We demonstrate below that the Court of Appeals' decision represents no departure from *Garner*. The district court correctly declined to instruct the jury in the language requested because (1) the evidence presented no basis for a conclusion that force was necessary to prevent flight, and (2) the instruction would have incorrectly told the jury that Hayes was justified in shooting Parker merely because he was suspected of a crime of violence, regardless of whether Hayes' use of force was necessary to protect his own life or that of another. In Part II, we demonstrate that the Court of Appeals correctly held that petitioner had not preserved the issue for review.

In *Garner*, this Court "determine[d] the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon." 471 U.S. at 3. This Court there held that "such force may not be used unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* (emphasis added)

The petitioner seeks to invoke *Garner* here by stating, "The shooting occurred after Parker, who had stated that he would accompany Officer Hayes and his partner to the police station, decided to flee" (Petition at 2). This sentence misleadingly suggests that Parker was shot while fleeing. In fact, as Hayes testified, Parker was standing still, a few feet away, between Hayes and a parked vehicle, when Hayes shot him. Parker was not fleeing (Tr. 199.) Hayes said he shot Parker because he was afraid Parker would shoot him; he never said he shot to prevent flight. (Tr. 204-05, 213-14, 218.); *see also* Findings of Assistant Chief Carr, reprinted *supra* pp.

12-14.) Hayes never told Parker he was under arrest nor invoked any authority to order him to halt (Tr. 1858-60).

The District conceded this point in its argument in support of its motion for directed verdict. Its counsel said:

> We would submit that there is not—with regard to the question of whether flight is an issue in our defense and our motion here, we would submit that Officer Hayes was not at that time shooting a fleeing felon. There was no intention on the part of the police officers to shoot Mr. Parker as a fleeing felon at any time.

(Tr. at 1488-89).[10] Consistently, later when the District's Inspector Edward Spurlock, head and founder of the ROP unit, testified that "we firmly believe that we should stop fleeing felons in certain situations," counsel for the District told the judge: "That [testimony] was not my expectation. I will not go further on the fleeing felon." (Tr. 1515.)

The trial court was justified in declining to give a "fleeing felon" instruction, half-heartedly requested at the end of the trial, because the District had deliberately shaped its evidence and tried its case on the theory that Hayes believed Parker was about to shoot him. Having explicitly declined reliance on the need to prevent escape, the District could hardly urge an instruction on that theory.

The supposed "*Garner*" instruction tendered by the District, would have been a manifestly incorrect state-

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[10] The District and Parker were in agreement on this point. Plaintiff's counsel had said earlier in opposing the motion for directed verdict: "And it is not Officer Hayes' contention, has not been to this point, that Mr. Parker was about to flee when he shot. This is not a case in which the court is going to be asked to decide the parameters of the fleeing felon rule either for the District of Columbia or the State of Maryland." (Tr. 1478.)

ment of the law in any event.[11] It is not correct, as the proposed instruction stated, that if Hayes knew Parker was suspected of a violent crime, Hayes could constitutionally have shot him after a warning. It is the need to prevent flight which justifies shooting an unarmed suspect of a violent crime. The proposed instruction did not require that the shooting be "to prevent escape," the evidence did not support it, and refusal to give the instruction was correct.

Petitioner argues that it presented evidence of an official policy that "permits the use of deadly force only in the most extraordinary of circumstances," *See* Petition at 5, and that a *Garner* type instruction was necessary to correct a misimpression Chief McLaren created that police may never shoot unless they see a gun. The Court of Appeals understood, however, that Parker did not challenge the official policy:

> The jury was charged with evaluating the adequacy of District police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem

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[11] The District's proposed instruction appears to have been derived from the following language of this Court's decision in *Garner*:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11-12. As the Court can readily see, the District omitted from its proposed instruction, reprinted *supra* p. 18, important language that is intrinsic to the meaning and holding of *Garner*, specifically the words "to prevent escape."

> Judge Green's instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law of this fact-bound case.

(App. 13a.)

The jury was entitled to look beyond the words of the District's official pronouncements. The fact that the District had articulated a policy does not mean that it had implemented it (or done so effectively).[12] The jury was entitled to believe, on the basis of the evidence presented by plaintiff, that it had not.[13]

The Court of Appeals correctly concluded that the instructions given conveyed the law concerning excessive force applicable to both Parker's common law and constitutional claims (App. 13a, 14a.) Those instructions,

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[12] *See Kibbe v. City of Springfield*, 777 F.2d 801, 808 (1st Cir. 1985) ("If the department recognized the importance of pursuing alternatives to deadly force, as [its] rule indicates, and yet failed to train on any alternative methods of stopping the suspect in a high-speed pursuit, a jury properly could draw the inference that the department made a conscious policy decision not to do such training."), *cert. dismissed*, 480 U.S. 257 (1987).

[13] As noted by the Fifth Circuit, "An injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). The District of Columbia Circuit has recognized that "[p]olice misconduct cases such as this one . . . do not involve express statements of policy . . . To succeed, a plaintiff must show a course deliberately pursued by the city . . ." *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986).

Moreover, a policy that is not itself unconstitutional may, nonetheless, provide the basis for municipal liability under Section 1983. *Fiacco v. City of Rensselaer*, 783 F.2d 319, 327 (2d Cir. 1986), (relying on plurality opinion in City of *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), *cert. denied*, 480 U.S. 922 (1987). In *Fiacco*, the court rejected the argument that "a municipal policy that is not itself unconstitutional but that merely permits or tolerates unconstitutional acts by city employees cannot be the basis for municipal liability under § 1983." 783 F.2d at 326.

which were never assigned as error by the District, correctly stated the reasonableness standard articulated by *Garner* (Tr. 2219-20, 2222-23).[14]

McLaren did not testify to any different standard. He testified that, in his opinion, Officer Hayes' use of deadly force was not reasonable under the circumstances because there was no immediate threat against Officer Hayes' life or against the life of the driver in the car. (Tr. 691.) His views on the question, like Lieutenant Carr's, were substantially affected by the fact that Hayes never saw a weapon (Tr. 691-92, 919). The District's expert witness, Glen R. Murphy, on the other hand, testified that Hayes' use of deadly force was reasonable, not to prevent flight but to prevent harm under the circumstances, and that it was not necessary for Hayes to see a weapon before shooting Parker (Tr. 1934).

The trial court clearly instructed the jury on the manner by which to evaluate the conflicting testimony of these experts on the issue (Tr. 2216), and the jury did so. Petitioner's contention that the district court should have told the jury Hayes could shoot Parker because he was wanted for a crime of violence is a gross misconstruction of the constitutional principle articulated in *Garner* and deserves no further consideration.

II. The *Garner* Instruction Issue Was Not Preserved and the Court of Appeals' Application of Federal Rule of Civil Procedure 51 Does Not Warrant Review

The Court of Appeals panel correctly held that petitioner failed to preserve an objection to the trial court's refusal to give an instruction supposedly based on *Garner* (App. 13a). The Court of Appeals' conclusion is entirely consistent with the clear directive of Rule 51:

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[14] The trial court properly instructed the jury that Parker had to prove Hayes' use of deadly force was unreasonable in order to prevail on his Section 1983 claim. (Tr. 2223, reprinted *supra* at 16-17.) Compare *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

> No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed.R.Civ.P. 51. The District did not object, either specifically or generally, to Judge Green's refusal to give its proposed instruction before the jury retired to consider its verdict. Nor did it assign it as a basis for reversal in the Court of Appeals.

Indeed, the District thought so little of this argument that it did not raise the issue on appeal. *See* Statement of Issues Presented for Review in Brief for Appellants at 1-2, reprinted in Appendix hereto. The first time it mentioned the denial of the proposed "*Garner*" instruction was in a footnote in its Reply Brief. Even then, however, the District did not assign it as a basis for error. Only after Judge Williams dissented in the Court of Appeals, in part on the ground that "the *Garner* error calls for reversal", did the District elevate the denial of its proposed instruction to an issue requiring review.

The District suggests that it attempted to repeat an objection to the Court's refusal of its "*Garner*" instruction before the jury retired but was prevented from doing so by the district judge. The District did attempt "to reiterate an objection" after the jury was instructed, but that objection had nothing to do with *Garner*. *See* Petition at 10. The objection counsel for the District then sought to make was "with regard to the administrative rulings," a reference to the internal disciplinary proceeding against Officer Hayes by the metropolitan police department. (Tr. 2230-31.)

Counsel's comments, made during the in-chambers discussion of jury instructions before the jury was charged,[15] did not rise to the level of an objection within

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[15] Counsel for the District had made no mention whatsoever of her proposed "*Garner*" instruction at the previous in-chambers conference on jury instructions (Tr. 2070-80).

the meaning of Rule 51. During the pre-charge conference, counsel suggested, notwithstanding the absence of evidence that Hayes shot Parker to prevent flight, that the District would like the jury to be told of the *Garner* "fleeing felon" principle.

> And I would suggest that the court consider adding somewhere in that portion of the instructions at least the second paragraph of our proposed instruction no. 4, and would ask that you do so in particular light of counsel's arguments yesterday giving an erroneous statement of the law to the jury with regard to *Tennessee v. Garner*. I think it's important, in light of these instructions, that the jury know that it would not be unconstitutional for a police officer to shoot a fleeing felon, or to shoot somebody—to apprehend somebody. And I think that that's a significant factor. I think the language is too vague as to what in fact the constitutional violation is. And we would submit that on those bases, at least, the instruction is not satisfactory. And if the court would consider paragraph 4, we would appreciate that.

(Tr. 2196.) A request to give an instruction is not equivalent to an objection to a refusal to give an instruction. *Johnson v. Houser*, 704 F.2d 1049, 1051 (8th Cir. 1983).

Moreover, a judge's comments, such as "that will make an interesting appeal," do not preserve an issue for appeal. *See Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d 681, 684 (10th Cir. 1966) ("[w]e warn counsel that even if the district court acquiesces in a procedure which is insufficient, a party may find that his rights have not been preserved").

The Court of Appeals' faithful application of Rule 51 in this case does not warrant review. Appellate court decisions construing Rule 51 demonstrate that whether an issue is preserved for appeal is necessarily fact-intensive and specific to the circumstances of each case. *See, e.g., Fischer v. Dallas Federal Sav. and Loan Ass'n.*,

835 F.2d 567, 569-70 (5th Cir. 1988) (failure to object to charge before jury retired barred consideration of the issue on appeal); *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 345-46 (6th Cir. 1985) (error not preserved for appeal where counsel objected to instruction in pre-charge conference but not after the jury was charged); *Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315, 318-19 (7th Cir. 1985) (objection to original proposed instruction did not constitute timely objection to amended instruction under Rule 51); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 255 (8th Cir. 1973) (appellants were required under Rule 51 to object to instruction after jury was charged in order to preserve error, even though trial court had denied appellants' requested instruction); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083-85 (2d Cir. 1970) (appellants' failure to object to five of seven claimed errors in charge before jury retired precluded raising them on appeal), *cert. denied*, 400 U.S. 1021 (1971); *See also Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d at 684 (requiring strict compliance with Rule 51).

III. The Court of Appeals' Decision Is Entirely Consistent With This Court's Decisions in *Monell v. Department of Social Services of the City of New York, City of Oklahoma City v. Tuttle, and Pembaur v. City of Cincinnati,* and Presents No Issue Requiring Determination By This Court

In the trial court, in the Court of Appeals, and even now, petitioner concedes that this Court's decisions in *Monell* and *Tuttle* concerning municipal liability under 42 U.S.C. § 1983 govern this case. As reflected in the jury instructions, the district judge was painstaking in her adherence to and invocation of these decisions (*see also* Tr. 2070-80, 2190-97). The instructions accurately reflect the governing law and did not, as petitioner contends, "permit liability to be imposed on a constitutionally untenable theory." *See* Petition at 20.

Petitioner has not challenged those instructions on appeal. It does not, therefore, ask this Court to impose here a standard greater than the one to which it agreed below. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, ——, 107 S.Ct. 1114, 1115 (1987) (This Court "ordinarily will not decide questions not raised or litigated in the lower courts," and this general rule "has special force where the party seeking to argue the issue has failed to object to a jury instruction.")

Although presented as a criticism of the Court of Appeals' analysis and "rulings," the final question for which the petition seeks review is actually a challenge to the sufficiency of the evidence. The sufficiency of that evidence has been examined four times—twice by the trial judge in ruling upon the motions for directed verdict, once by the trial judge in ruling on the motion for judgment notwithstanding the verdict, and again by the Court of Appeals. The general rule of this Court is "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Torres-Valencia v. United States*, 464 U.S. 44, 45 (1983) (Rehnquist, J., dissenting).

This case does not present any issue important to this Court's determination of the parameters of municipal liability under 42 U.S.C. § 1983. The District of Columbia was not held liable for Parker's injuries under an impermissible theory of *respondeat superior*. *See Monell*, 436 U.S. at 691. The jury was not permitted to find liability for inadequate training based upon one isolated incident of police misconduct. *Cf. Tuttle*, 471 U.S. at 823-24. As noted by the Court of Appeals,

> "[u]nlike *Tuttle*, this case does not involve a single incident that gives rise to an inference of inadequate training. It involves a sad series of mishaps linked to a policy of sorely deficient training, supervision and discipline."

(App. 6a.) The jury was not allowed to find the city liable for mere negligence, but was required to apply a

much higher standard. *Cf. Kibbe*, 480 U.S. at 257. The burden of proof was not shifted to the District to prove the adequacy of its training, but was placed firmly upon Parker to prove that the District's failures constituted gross recklessness and gross indifference to his civil rights. *Cf. Harris v. Cmich*, No. 85-3314, slip op. at 6 (6th Cir. July 2, 1986), *cert. granted sub nom. City of Canton v. Harris*, 108 S.Ct. 1105 (1988). In sum, this case does not present any significant question of public import under 42 U.S.C. § 1983 requiring intervention or clarification by the Supreme Court.

There is not a serious question as to whether Parker demonstrated municipal responsibility for the conduct which caused his injuries.[16] This case is controlled on the facts by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), a decision not referred to in the petition. In that case, this Court upheld the liability of a county for an illegal search conducted by police officers acting under instructions from the sheriff and county prosecutor, and explained why the result was consistent with *Monell*. *"Monell,"* it said, "is a case about responsibility." 475 U.S. at ——, 106 S.Ct. at 1297. The core of the *Monell/Tuttle* analysis is that plaintiffs must demonstrate conduct by the municipality, and not merely by its employees, "and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 U.S. at ——, 106 S.Ct. at 1298.

Municipal responsibility is precisely what Parker proved. His injuries were caused, as in *Pembaur*, not by a low-level decision by a desk officer or street policeman on routine patrol. They were caused by conduct which was the deliberate and conscious choice of police depart-

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[16] The jury was properly instructed with both the language "moving force" and "affirmative link." *See Monell*, 436 U.S. at 694; *Tuttle*, 471 U.S. at 823. Causation is an issue of fact for the jury's determination. *See Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987).

ment officials actively making policy[17] for the District of Columbia. Although Officer Hayes' hand was on the gun, the District of Columbia was just as responsible for Parker's injuries as if those officials had ordered Hayes to shoot. The uncontested evidence presented at trial was that Chief Turner gave Inspector Spurlock full authority to organize, design, and set policy for the ROP squad. Inspector Spurlock proudly took responsibility and credit for the unit and for the Parker shooting in particular. (Tr. 1620-22.)

Respondent is aware that this Court has granted certiorari, without opinion, and heard argument in *City of Canton v. Harris*, No. 86-1088. *See City of Canton v. Harris*, 108 S.Ct. 1105 (1988) (granting petition for writ of certiorari). The successful petition in that case raises the question whether inadequate training can be a "policy or custom" of a city within the meaning of *Monell*, without independent evidence that the city knew or should have known that the training was inadequate and therefore that violations of constitutional rights might foreseeably result from any inadequate training. Petition for Writ of Certiorari, *City of Canton v. Harris*, No. 86-1088 (U.S., filed Jan. 2, 1987). Although it involves inadequate training, *Harris* is very different from this case. The City of Canton was held liable under 42 U.S.C. § 1983, for the actions of the admitting officer of the city's jail, who had discretionary authority to arrange for special medical care for an arrestee, but who did not receive specialized medical training to detect potential mental illness in an arrestee. That one, rather narrow failure of a municipality to train does not approach the magnitude or seriousness of the conduct of the District of Columbia in this case.

Respondent does not believe that this case would be decided differently even if the Court resolved the issue in

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[17] Petitioner did not contest on appeal that Parker had proved involvement of "policymakers" for purposes of § 1983.

favor of the petitioner in *Harris*. For reasons already described, the evidence in this case demonstrated municipal responsibility far more egregious than a mere failure to train. We respectfully disagree, therefore, that this case should be held pending decision in *Harris*.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7039

DON R. PARKER, *et al.*,
Appellees,

v.

WILLIAM HAYES, *et al.*,
Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a municipality may be held liable pursuant to 42 U.S.C. section 1983 only if it establishes a "policy" or "custom" that "causes" a person's constitutional rights to be violated. In this case, the District of Columbia was held liable under *Monell* for injuries suffered by a suspected felon who was shot by a District police officer in Maryland after he attempted to "hijack" a passerby's automobile with the

driver inside and after it appeared that he was reaching for a weapon.

The issues presented for review are:

I. Whether the failure of the police officer to arrest the suspected felon before his attempt to "hijack" the automobile, even if pursuant to an inadequate District training program, can constitute a District policy or custom that caused a violation of the suspected felon's constitutional rights?

II. Whether the District may be held liable for injuries stemming from the shooting because it did not have a policy that prohibited its police officers from using deadly force unless and until they see a weapon, even though the District's policy on the use of deadly force satisfies constitutional requirements?

III. Whether the District can be held liable for injuries stemming from the shooting on a theory of inadequate training in alternative methods to the use of deadly force, when the plaintiff did not even attempt to establish what the District's training program was and when the plaintiff failed to establish that the District's training program was grossly negligent or even negligent in the case of the police officer who fired the shot?

Supreme Court, U.S.
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No. 88-810

In The

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER, *et ux.*,
Respondents.

Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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I. The *Garner* Instruction Should Have Been Given.

The Opposition's argument that the *Garner* instruction was properly denied ignores why that instruction was requested; what the actual instruction requested was; and what the impact of *Garner* is for cases like this one. That approach should not be permitted to obscure the fact that without the *Garner* instruction, the jury was permitted to find the District liable simply because, as allowed by District policy, a police officer, who feared imminent death, shot a suspected felon without actually seeing a gun in that suspect's hand.

As the Opposition concedes (Opp. at 15), the constitutional tort *claimed* in this case is that Officer Hayes used unreasonable force when he shot Parker. Admittedly, however, Officer Hayes testified that he shot Parker when it appeared that Parker was reaching for a gun. He shot because he believed that his own life and that of an innocent motorist were threatened and to prevent Parker from renewing his efforts to steal that motorist's automobile with the motorist inside. The District was entitled to have its view of the facts fairly evaluated by the jury.

At trial and on appeal, the District urged that *Tennessee v. Garner*, 471 U.S. 1 (1985), provided substantial guidance in resolving Parker's constitutional claim. In the District's view, *Garner* stands for the fundamental proposition that a police officer may use deadly force when he reasonably believes that a suspect poses a threat of serious physical harm to himself or to others or when he reasonably believes that deadly force is necessary to apprehend a suspect if he has probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm and, if, where feasible, a warning has been given.

By contrast, Parker urged that the particular factual context of *Garner*—a suspect actually in flight at the precise moment he was shot—is a limitation on when police officers may use deadly force. In addition, Parker urged that the

District's deadly force policy was flawed because it did not require that a police officer see a weapon before shooting and that Officer Hayes acted unreasonably because he fired without having seen a weapon in Parker's hand.

Evidence was introduced on both theories. Parker called Officer Hayes as his very first witness and established a major, if not the major, theme of his trial—that a police officer may not reasonably shoot a suspected felon until and unless he sees a weapon in the hands of his adversary. In response to questions from Parker's counsel of record in this Court, Officer Hayes testified:

> Q. Did it occur to you, Officer Hayes, to wait to see whether or not Mr. Parker had a weapon before you fired the first round?
>
> A. Mr. Taylor, I was in fear of my life. I wasn't going to sit around and see a smoking gun explode in my face and sustain a fatal wound or a potentially fatal wound before I determined that I was going to shoot. I had to make my decision at the time that I felt that I was in danger.
>
> Q. Did you consider whether or not you might wait to see whether he had a gun before you fired?
>
> A. As I just explained, sir, I wouldn't consider that, because I could have been injured and the lady kidnapped and injured by the time I waited to see a smoking gun explode in my face. [T. 205].

Having established that Officer Hayes did not see a weapon, Parker brought on his expert witnesses. In the opinion of Roy C. McLaren, whether a weapon has been seen was dispositive of both the unreasonableness of the District's deadly force policy and of Officer Hayes' action:

> Q. What does a reasonably careful and prudent training program train an officer to do with regard to the use of force when he suspects but does not see a weapon?
>
> A. To use other means of force necessary to control, but only that amount of force necessary to control or to make an arrest, and certainly short of deadly force if there is no gun apparent.

> Q. Is it reasonable, in your opinion, to fire when the officer could not see a gun in Mr. Parker's hands?
>
> A. No. [T. 691-92].

Later on, McLaren reiterated: "You must see a gun in order to make sure that there is an actual threat to yourself or someone else." [T. 726].

The District unsuccessfully moved for a directed verdict. In doing so, the District urged that *Garner* permitted Officer Hayes to shoot because he believed that his life was in imminent danger and because "kidnapping is a serious crime which was taking place in front of Officer Hayes . . .." [T. 1474]. The District added:

> . . . We would submit that Officer Hayes wasn't even shooting for the purpose of preventing an escape. Officer Hayes was acting for the purpose of protecting himself and Ms. Rainford and that that is an even greater justification than that provided by the Court in . . .Garner.
>
> * * *
>
> . . . There was no intention on the part of the police officers to shoot Mr. Parker as a fleeing felon at any time. Officer Motley never shot him while he was running through the woods. They were trying to use the least amount of force necessary. [T. 1474, 1488-89].

The legality of the District's deadly force policy and of Officer Hayes' decision to shoot without having seen a gun was also a focal point of the closing arguments to the jury. Thus, counsel for Parker urged:

> . . . I say to you, Ladies and Gentlemen, that background information never justifies a police officer in shooting his weapon at a man *when he does not know that he's armed.* It could be Jack the Ripper standing there, . . . the worst criminal that has ever come down the pike, *and if that officer doesn't know that he's armed* and doesn't have reasonable grounds to believe that he's going to take some action against him, he may not shoot.
>
> * * *
>
> . . . No, you shouldn't forget about the fact that Don Parker had a criminal record. But that doesn't

> justify an officer shooting anybody *when he doesn't know that that person has a gun and is about to use it. Those two things.* Officers arrest people with guns all the time. You heard Officer Hayes testify to that effect. Officers arrest people with guns in their hands. But *until the officer knows he's armed and sees that the gun is headed in his direction or in the direction of an innocent person,* he is not justified in firing his gun and attempting to kill the person that he's shooting at. [T. 2103-04 (Emphasis added.)].

On the next morning, the District asked the court to give one paragraph of its proposed *Garner* instruction:

> . . . [I]t is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm either to the officer or to others. It is also constitutional for an officer to use deadly force in *apprehending* a suspect, if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, if, where feasible, some warning has been given. [Emphasis added.]

The District made its request "in particular light of counsel's arguments yesterday giving an erroneous statement of the law to the jury with regard to . . . Garner." [T. 2196]. In view of that, the District also urged that "the language [in the proposed instructions] is too vague as to what in fact the constitutional violation is." [T. 2196].

The trial court refused to give the instruction.

The Opposition addresses only the second sentence of the instruction, and thus implicitly concedes that the first should have been given. That concession is correct. *Garner* cannot stand for the proposition that a police officer may shoot a suspected felon if, and only if, that suspected felon is actually running away, rather than momentarily pausing, when he appears to be reaching for a weapon. *See Sherrod v. Berry,* 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*).

The second sentence in the proposed instruction was also proper in view of *Garner,* the evidence, Parker's closing

arguments, and the rest of the jury instructions. Thus, Parker is wrong in suggesting that the second sentence of "the instruction would have incorrectly told the jury that Hayes was justified in shooting Parker merely because he was suspected of a crime of violence regardless of whether Hayes' use of force was necessary to protect his own life or that of another." Opp. at 19. The instruction would have told the jury that Officer Hayes was permitted to shoot Parker in order to apprehend, or stop, Parker if he also had probable cause to believe that Parker had committed a crime involving the infliction or threatened infliction of serious physical harm. The evidence demonstrated that Officer Hayes had never suggested that he shot Parker merely because he was wanted for armed robbery; and, indeed, during the chase, neither Officer Hayes nor his partner fired a shot. The evidence also demonstrated that, at the time he fired, Officer Hayes was confronted by a person who had just attempted to kidnap an innocent passerby and who appeared to be armed; that Officer Hayes had momentarily thwarted those efforts but had been unable to subdue Parker physically; and that Parker was adjacent to the open door of the automobile, with its motor running (and with the innocent passerby still inside). Officer Hayes testified that he believed that deadly force was necessary at the moment he shot in order to stop, arrest, or apprehend Parker. As a result, the instruction could not reasonably have been interpreted by the jury as permitting Officer Hayes to shoot Parker simply because he was a felony suspect.

In short, the law, as set forth in *Garner,* and the evidence fully supported the District's request for both parts of the instruction. Furthermore, the need for all or part of this instruction was critical in view of the repeated emphasis by Parker's expert and his counsel that Officer Hayes had acted improperly because he had not seen a weapon before he shot, and that the District's policy was flawed because it does not forbid police officers from using deadly force unless they actually see a weapon.

The fact that the jury was given the standard instruction for evaluating expert testimony did not cure this error because the jury was not informed of the constitutional stan-

dard by which it should have measured the conflicting expert testimony (and evaluated the closing argument by Parker's counsel). As a result, the instructions given permitted liability to be imposed on a constitutionally untenable theory, and reversal is required. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 821-22 (1985) (plurality op.); *id.* at 830-33 (Brennan, J., concurring).

II. There Is A Square Legal Conflict In The Circuits Over Whether a Formal Objection To Jury Instructions Must Always Be Made Immediately Before The Jury Retires.

As a leading scholarly treatise has recognized (Pet. at 22), and as Parker implicitly concedes, there is a conflict among the Circuits over whether a formal objection to jury instructions must be made in any and all circumstances. Parker's only opposition to this Court's review of this issue is that it is fact-bound. He does not contend that the trial judge in this case was not fully and fairly apprised of what the District wanted before the jury retired to deliberate; nor does he deny that the trial judge, after closing arguments but before the jury was instructed, issued a final ruling that the proposed *Garner* instruction should not be given and directed counsel to raise only new objections to the instructions after they were given.[1] *See* Opp. at 23-26.

The issue whether an objection amounting to a mere formality must be made, over a trial court's express directive to raise only new objections, is in no way fact-bound. Furthermore, the new cases cited by the Opposition support the District's argument that the panel majority erred in ruling that the District had failed to comply with Fed. R. Civ. P. 51.[2]

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[1] The Opposition is wrong in suggesting (Opp. at 24) that the *Garner* jury instruction issue was not properly raised *on appeal*. Rather than recite to this Court the details of the District's *Garner* arguments on appeal, it is enough to say that the majority, which *sua sponte* managed to find a Rule 51 problem, nowhere suggested that the *Garner* jury instruction had not been properly raised by the District on appeal. Indeed, as Parker admits (Opp. at 2), the majority rejected on the merits the District's argument that the instruction should have been given.

[2] In three of the cases, the complaining party not only failed to object to the jury instructions as given but also failed to alert the trial court in any meaningful way of a claim of error. *See Spanish Action Committee of Chicago v. Chicago*, 766 F.2d 315, 318-19 (7th Cir. 1985); *United*

[Footnote continued on next page]

III. This Petition Presents Important Issues Concerning The Proper Interpretation of *Monell*.

At trial, Parker vigorously attacked the District because it imposed no requirement that police officers actually see a weapon before they may use deadly force. This requirement is not mandated by the Constitution, and the evidence was uncontradicted that the District's deadly force policy complied with the Constitution; that the District rigorously communicated its policy to its police officers; and that Officer Hayes understood this policy.

Accordingly, as both the lower courts recognized, this case presents an important legal issue: Can the District, although it has rigorously implemented a constitutional deadly force policy be held responsible under *Monell* for Parker's injuries assuming, *arguendo,* that it inadequately trained its officers in extrajurisdictional arrest authority and/or in hand-to-hand combat? Put another way, in a case claiming that a police officer's use of deadly force was excessive, does *Monell* bar liability against a municipality which has adopted and implemented a constitutional deadly force policy?

Depending on the resolution of that fundamental legal issue, the Petition also sets forth two other principal reasons

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[Footnote continued from previous page]
States v. Heyward-Robinson Co., 430 F.2d 1077, 1083-85 (2d Cir. 1970),*cert. denied*, 400 U.S. 1021 (1971); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 255 (8th Cir. 1973). In *Heyward-Robinson*, moreover, the court distinguished a case in which a claimed error was in no way brought to the trial court's attention from a case "where counsel had made his position abundantly clear and the trial court had made it plain that further efforts on his part to except or object would be unavailing and had warned him not to take exceptions." 430 F.2d at 1084. In *Fischer v. Dallas Federal Savings and Loan Ass'n*, 835 F.2d 567, 569 (5th Cir. 1988), the court merely ruled that a request for an instruction *before* trial is, itself, insufficient to preserve for review a failure to give an instruction when the trial court gave the parties "ample opportunity to object to the proposed charge" and counsel had failed to object to the omission of the jury instruction. Finally, in *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985), the court, following *Dunn v. St. Louis-San Francisco Ry*, 370 F.2d 681 (10th Cir. 1966), ruled that a party, who indicated only that he had a problem with a proposed jury charge in a precharge conference but failed to object when the court expressly invited counsel to do so after the charge was given, had failed to preserve the claimed error for review. At the same time, the court recognized that where an exception after a charge would be a mere formality, an exception need not be taken to preserve the error for review.

why the District may not, consistently with *Monell*, be held responsible for Parker's injuries; namely, that *Monell's* "moving force" requirement means much more than "but for" causation, and that "deliberate indifference" means much more than mere inadequacy.

For example, any inadequate training on extrajurisdictional arrest authority cannot be deemed the "moving force" of Parker's injuries. The court of appeals' decision to the contrary squarely conflicts with *Cameron v. Pontiac, Michigan*, 813 F.2d 782 (6th Cir. 1987), as implicitly conceded by the Opposition, which fails to address *Cameron*. Furthermore, any such inadequate training cannot be deemed deliberately indifferent to life for two independent reasons. One, training in extrajurisdictional arrest authority does not even deal with the circumstances in which a police officer may use deadly force, the constitutional tort asserted by Parker. Second, even if an *utter absence* of such training could conceivably cause a police officer to shoot in circumstances in which the Constitution says he may not, the record here demonstrates that training in extrajurisdictional arrest authority was given and that the District rigorously instructed its police officers to secure local assistance whenever they reasonably expected to effect an extrajurisdictional arrest.

As another example, any alleged failure to train MPD officers in hand-to-hand combat was neither the moving force behind Parker's injuries nor deliberately indifferent to the unlawful use of deadly force. Assuming, *arguendo*, that Officer Hayes received only one hour of training in hand-to-hand combat, and that Officer Hayes would have been able to subdue Parker during the initial confrontation in the passerby's automobile, had he been given more rigorous training in hand-to-hand combat, any lack of training had, at best, only a "but for" connection with Parker's injuries. This level of causation is insufficient. Furthermore, this Court has never held that the Constitution requires that police officers be trained in hand-to-hand combat, or that any lack of training in

hand-to-hand combat may be said to be deliberately indifferent to the use of unlawful deadly force.[3]

This case is, therefore, an appropriate vehicle to illuminate the meaning of *Monell* in the important context of law enforcement. Juries throughout the country are being instructed in the language of "deliberate indifference" and "moving force." However, this Court has yet to explain, as a practical matter, what this language means. In addition, as this Court knows from its own docket, *Monell* cases charging inadequate supervision, training, and discipline are proliferating and becoming increasingly expansive—to the point where every facet of a municipality's operations is being subjected to microscopic scrutiny to determine whether it is "inadequate" in some respect. As a result, this Court is not likely to get a case that provides the factual record necessary to make an informed judgment about what the Constitution requires and, at the same time, is not "fact-bound" in some respects.

Finally, this is a case that cries out for review. Here, a jury expressly found that Officer Hayes did not use excessive or unreasonable force in shooting a person who was wanted on an armed robbery charge; who was in the process of attempting to kidnap an innocent motorist; and who responded to Officer Hayes' command to freeze by verbally threatening him and reaching for his waistband. The same jury nevertheless found that the District somehow had violated Parker's due process rights, in a case in which Parker con-

[3] In their efforts to persuade this Court to deny review, counsel for the Parkers have seriously misstated the evidence presented on the issue of training in methods of subduing suspects. *Compare* Opp. at 9-12 with Pet. App. at 37a-39a (Williams, J., dissenting). The evidence was that the MPD continuously provided training to its officers, including the holds and other tactics mentioned by Parker's experts. The evidence also demonstrated, however, that the MPD recognizes that it cannot predict every set of circumstances in which a police officer may find himself; that each and every police officer may have to make a split-second decision with no opportunity to consult superiors; and that a police officer, in those circumstances, must exercise judgment based on his training and experience. As a result, the training given the experienced police officers who were selected for the Repeat Offender Project does not deserve the epithets—"live by your wits ethic," "ad libbing" and "freelancing."

tended that the District should have taught its police officers not to shoot until they see a weapon in the hands of an adversary and that the District had inadequately trained its police officers about extrajurisdictional arrest authority and hand-to-hand combat.

When all is said and done, the principle for which the majority opinion stands is that a municipality may be held liable whenever flaws, or presumed flaws, in training policies helped to create a confusing situation that preceded a police officer's use of deadly force in *circumstances permitted by the Constitution,* but hindsight reveals that the use of such force was not necessary. Such a principle surely deserves Supreme Court review.[4]

CONCLUSION

This Court should grant the petition.

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[4] Although the District has raised a number of issues in its Petition this Court need not necessarily reach all of them. Thus, for example, if this Court should agree with the District's contentions on the scope of *Monell,* it need not decide the *Garner* and Rule 51 issues. On the other hand, this Court could, summarily, the District believes, reverse the court of appeals on the *Garner* and Rule 51 issues. If the Court should do so, the District, at the very least, would entitled to a new trial on the 42 U.S.C. § 1983 claim (presumably limited to the issue of liability).

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for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE, CITY OF LOS ANGELES, CALIFORNIA, AND OTHER JOINING GOVERNMENTAL ENTITIES, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE.

The City of Los Angeles ("City") is a vast metropolitan community with a police force of 7500 sworn officers. This city, like many others, is not lacking in eager litigants, and civil rights decisions from distant circuits spawn new waves of civil filings in the district courthouse.[1] There-

[1]The concern regarding burgeoning civil rights caseloads, reflected repeatedly in opinions of this Court, became evident more than a decade ago in the caution that 42 U.S.C § 1983 should not become a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 699, *reh. den.* 425 U.S. 985 (1976).

fore, City policymakers and their advisors view the opinion in the case before this Court on petition with some alarm.

In 1987, the most recent year for which statistics are available, officers of the Los Angeles Police Department documented 2,087,442 citizen contacts, and 118 occasions on which an officer intentionally discharged a firearm. The City's policy with respect to the use of firearms is as follows:

"An officer is authorized the use of deadly force when it appears reasonably necessary:

* To protect himself or others from an immediate threat of death or serious bodily injury, or
* To prevent a crime where the suspect's actions place persons in jeopardy of death or serious bodily injury, or
* To apprehend a fleeing felon for a crime involving serious bodily injury or the use of deadly force where there is a substantial risk that the person whose arrest is sought will cause death or serious bodily injury to others if apprehension is delayed." (Manual of the Los Angeles Police Department, Sec. 1/556.40.)

This policy is consistent with the constitutional standards set forth by this Court in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985):

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the

> infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

With an interest in maintaining the limited nature of municipal liability under § 1983, the City recently brought to this Court the issue of whether municipal policies and customs can form the basis of liability absent an underlying unconstitutional act. In *City of Los Angeles v. Heller*, 475 U.S. 796, *reh. den.* 476 U.S. 1154 (1986), the Court held that the policies and customs of a police department are "quite beside the point" if the underlying act of the officer was constitutionally permissible.

When, as in the instant case, a trial court declines to instruct the jury on the constitutional standards for permissible use of deadly force, a municipality is exposed to liability under § 1983 even though its officers have acted reasonably and in self defense. Armed with the opinion below, an increasing number of litigants will assert federal civil rights violations against the City of Los Angeles — indeed against municipalities throughout the nation — citing this case for the remarkable proposition that cash may be obtained from public coffers even when officers act within the constitutional boundaries drawn by this Court in *Garner*. Further, municipal liability would be determined differently in each trial, according to standards devised by "expert witnesses"; simply put, the constitutional standards articulated by this Court would never reach the jurors' ears.

This brief is submitted in support of petitioner because the City of Los Angeles and the other participating governmental entities represent a significant interest in avoiding the needless litigation and risk of unwarranted liability which can easily result from an opinion that misapplies the principles enunciated in *Garner* and *Hel-*

ler. In addition to the Cities participating, a representative number of States through their Attorneys General join in this brief. These States have a responsibility to ensure the health, safety and welfare of their citizens through the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies of other governmental units. In varying degrees the Attorneys General also assume responsibility for defending public officials and law enforcement officers who are subject to actions for damages under § 1983, and for assisting other governmental units in defending such actions. Thus, the participating States represent a widespread concern for protecting entities, officials and officers from monetary liability.

Because of their interest in providing effective law enforcement and in protecting against unwarranted liability, the governmental entities listed in Appendix "A" join the City of Los Angeles in supporting the petition before this Court.

SUMMARY OF ARGUMENT

Consistent with the questions presented by petitioner, the city maintains that the judgment below is erroneous for failure to instruct the jury on the constitutional standards governing the use of deadly force as set forth in *Garner.*

To supplement petitioner's detailed and well-reasoned analysis, the City's argument focuses only on the teachings of *City of Los Angeles v. Heller:* Absent an underlying constitutional violation, police policies and practices are "quite beside the point." 475 U.S. at 799.

Under *Heller,* jurors must be allowed to apply constitutional standards to § 1983 shooting cases for two reasons: (1) When the use of deadly force is reasonable under

Garner, there can be no municipal liability for lack of a constitutional tort; and (2) when the use of deadly force is reasonable under *Garner*, municipal policies related to training, discipline and supervision cannot provide a separate basis for liability.

This focus is not intended to detract from or to minimize the importance of petitioner's strong position with respect to the insufficiency of the evidence of a municipal policy causally linked to a constitutional deprivation. Indeed, the City endorses this position and urges that the motion for judgment notwithstanding the verdict was improperly denied below.

ARGUMENT

I

WHEN THE USE OF DEADLY FORCE IS REASONABLE UNDER *GARNER*, THERE CAN BE NO MUNICIPAL LIABILITY FOR LACK OF A CONSTITUTIONAL TORT

It is axiomatic that the existence of an underlying constitutional violation is an element of any § 1983 action against a municipality:

> "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."

City of Los Angeles v. Heller, supra, 475 U.S. at 799, emphasis in original. When a plaintiff alleges that the use of deadly force violated his constitutional rights, he may prevail under § 1983 only if the use of force was unreasonable under federal constitutional standards. *Tennessee v. Garner, supra*, 471 U.S. at 11-12.

Nevertheless, in the instant case, the district judge refused to instruct the jury regarding the degree of deadly force which is constitutionally permissible under *Garner* and, in so doing, allowed the jury to impose municipal liability under § 1983 without first finding that the officer's use of deadly force was unconstitutional.

Highlighting the importance of the missing *Garner* instruction, the jury returned verdicts for the municipal defendant on the *respondeat superior* count, specifically finding that the officer "did not use unreasonable and excessive force against Don Parker on the plaintiff's claim of Assault and Battery." Appendix to Petition for Writ of Certiorari ("Appendix"), p. 64a. The district judge observed that self-defense was a "supported assertion" at trial. Appendix, p. 48a, n. 5.

Because the jury was instructed that self-defense would exonerate the municipal defendant on the common law charge of assault and battery, the absence of similar "reasonable force" standards as to the civil rights charge was an especially glaring omission. Necessarily left with the notion that the use of deadly force violates the federal constitution regardless of self-defense or other mitigating factors, the jury could not properly examine the policies and customs of the local police department. Without a *Garner* instruction, it was inevitable that the jury's analysis would be confused and misguided: In spite of a finding that the use of deadly force was neither excessive nor unreasonable, municipal liability of almost a half-million dollars was imposed.

The persuasive force of holdings from the District of Columbia Circuit on issues of governmental liability makes the opinion below especially significant to municipal defendants. The failure to instruct on constitutional standards for the use of deadly force caused this jury to examine municipal policies and customs which may well

have been "quite beside the point." Only if the shooting were found unreasonable by *Garner* standards would it have been appropriate for the jury to consider whether any policies or customs of the District of Columbia caused the use of deadly force. *City of Los Angeles v. Heller, supra,* 475 U.S. at 799.

II

WHEN THE USE OF DEADLY FORCE IS REASONABLE UNDER *GARNER,* MUNICIPAL POLICIES RELATED TO TRAINING, DISCIPLINE AND SUPERVISION CANNOT PROVIDE A SEPARATE BASIS FOR LIABILITY

The court below acknowledged that a municipal policy must be "the moving force of the constitutional violation" to support a § 1983 claim against a municipality. *Polk County v. Dodson,* 454 U.S. 312, 326 (1981); *Oklahoma City v. Tuttle,* 471 U.S. 808, 820 (1985). Although this causation standard assumes the existence of an underlying "constitutional violation," the Circuit opinion focuses instead upon whether the municipal *policy* must be unconstitutional, a separate issue which is now before this Court in *City of Canton v. Harris,* No. 85-3314 (6th Cir. Sept. 5, 1986), *cert. granted,* 108 S.Ct. 1105 (1988) (No. 86-1088). The Circuit Court concluded: "Until we receive contrary direction from the [Supreme] Court . . . systemic and grossly inadequate training, discipline, and supervision" will suffice to impose municipal liability. Appendix, page 6a.

In focusing on the adequacy of municipal training policies, the court failed to examine the underlying tort: Did Mr. Parker suffer a constitutional injury when he was shot while attempting to escape with a hostage? If this use of deadly force was reasonable under the standards as articulated by this Court in *Garner,* Parker's federal due

process rights were not violated by the shooting, and police training policies are not at issue. Whether such policies be characterized as negligent, inadequate, grossly inadequate, reckless or intentionally deficient, they simply are not material to this constitutional claim. *City of Los Angeles v. Heller, supra,* 475 U.S. at 799.

The jury was not able to analyze Parker's constitutional claim properly, because it was not instructed on the law of unreasonable force as it relates to constitutional injuries. In essence, the jury was told to examine in a vacuum the policies of the police department related to training, discipline and supervision. The opinion below constitutes especially dangerous precedent by concluding that a municipality is liable under § 1983 if a municipal policy is "a substantial factor in bringing about harm," even if the harm is "unforeseeable." Appendix, p. 10a.

The language of this opinion extends municipal liability well beyond the bounds of the precedents of this Court. By condoning the failure to instruct on what constitutes reasonable deadly force under federal constitutional standards, the court below provides authority for a new brand of liability founded solely in municipal policies. This unprecedented constitutional tort triggers municipal liability when a "reckless" or "grossly inadequate" municipal policy contributes to a constitutionally *permissible* action. The cardinal rule of tort law is swept away: Recovery without injury is allowed. It should not be surprising that the City of Los Angeles and the other participating governmental entities have significant concerns regarding the potential impact of this case.

CONCLUSION

For the reasons presented by petitioner as well as those discussed herein, the Cities and States participating in this brief strongly support the petition of the District of Columbia. Because the opinion of the Circuit Court fails to comport with *Garner* and *Heller,* it provides precedent for an unwarranted theory of recovery under § 1983: The quality of police training, discipline and supervision provides an independent basis for municipal liability; therefore, this Court's due process standards governing the use of deadly force need not be shared with a jury.

The notion that "expert witnesses" shall articulate the standards for the use of deadly force, while the dictates of this Court are not revealed, is startling indeed. Even more alarming is the suggestion that a municipality may be liable under § 1983 for inadequately training an officer whose use of deadly force was, nevertheless, constitutionally permissible.

The constitutional questions and public policy concerns at issue in this case warrant this Court's review.

Respectfully submitted,

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APPENDIX "A"

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I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 29, 1988, I served the within Brief of Amicus Curiae in re: "District of Columbia vs. Donald R. Parker" in the United States Supreme Court, October Term 1988, No. 88-810.

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 29, 1988, at Los Angeles, California

TRACY LATZKO

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-810

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,

Petitioner,

v.

DONALD R. PARKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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No. 88-810

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INTEREST OF THE AMICUS CURIAE

Like many other communities across the nation, the municipal government of the City of New York maintains a police force for the

protection of the general public. Police officers in this densely populated urban center face particular challenges, as they are called upon to exercise their judgment quickly, in a wide variety of situations each day. Split-second decisions regarding the use of deadly force are among the most difficult determinations that police officers make in the line of duty.

The City of New York is very much concerned about the practical implications of the Court of Appeals holding in this matter of vital public interest. The decision of the Court of Appeals for the District of Columbia Circuit significantly expands municipal liability under 42 U.S.C. §1983. It appears to be in conflict with recent, controlling precedent and with the decisions of other Courts of Appeals. Accordingly, the City of New York respectfully submits this brief, pursuant to Rule 36.4 of the rules of this

Court, in support of the District of Columbia's petition for a writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE GRANTED IN ORDER TO CLARIFY THE APPLICABLE STANDARD FOR POLICE USE OF DEADLY FORCE, SO THAT LOCAL AND MUNICIPAL GOVERNMENTS MAY BE GUIDED IN THEIR POLICIES AND TRAINING PRACTICES IN THIS SENSITIVE AREA.

In the instant case, review by this Court is warranted because the issues presented are recurring ones of public importance and nationwide significance. The Court of Appeals for the District of Columbia Circuit has affirmed a judgment pursuant to a jury verdict finding, inter alia, that petitioner "had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due

process of law . . . " (App. 61a, 64a).[1] The Court of Appeals upheld the District Court's imposition of liability and award of damages under 42 U.S.C. §1983, as construed by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978).

In so ruling, the Court of Appeals let stand a verdict based in large part on expert testimony advocating a stricter standard for police use of deadly physical force than this Court held to be constitutionally required in Tennessee v. Garner, 471 U.S. 1 (1985). Respondents' experts opined, inter alia, that a police officer may use deadly force only when he

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[1]Unless otherwise indicated, numerical references in parentheses denoted "App. ___" refer to pages in the Appendix to Petition for Writ of Certiorari filed by petitioner herein.

sees a weapon in the hands of an adversary and that the subject incident revealed deficiencies in petitioner's training, supervision, and disciplinary policies. The new standard countenanced by the Court of Appeals is a departure from relevant precedent in this Court and other appellate Courts. See, e.g., City of Springfield v. Kibbe, 480 U.S. 257 (1987)(per curiam); City of Los Angeles v. Heller, 475 U.S. 796 (1986)(per curiam); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality); Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988); Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988); Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987), cert. denied, __U.S.__, 108 S.Ct. 701 (1988); Turpin v. Mailet, 619 F.2d 196 (2d Cir.), cert. denied, 449 U.S. 1016 (1980).

In addition, the decision below endorses a significant departure from prevailing

practice among this country's police departments. The standard applied in the case at bar is one which we fear will exacerbate the risk to police officers, as well as to innocent third persons. Permitting the jury to second-guess this police officer's decision to use deadly force pursuant to his department's policy, without having instructed the jury as to the applicable constitutional standard, defies both law and logic.

In establishing policies with respect to the use of deadly force, local and municipal governments must address competing concerns, seeking to minimize the use of deadly force while accomplishing legitimate governmental goals. To this end, the New York City Police Department has carefully promulgated a written policy on the use of physical and deadly physical force. This Court's decision in Garner, supra, is an

integral component of New York City's policy, which is more restrictive than the justification standard set forth in N.Y. Penal Law §35.30 (McKinney 1987). In similar fashion, police departments throughout the nation have updated their policies and training materials to reflect the constitutional standard enunciated in Garner, supra, 471 U.S. at 11-12.

It is our understanding that this petition presents for review issues arising out of a single incident in which a police officer acted pursuant to a departmental policy which was entirely consistent with Garner and other pertinent authority. Under the facts and circumstances of this case, local and municipal governments find the imposition of liability upon petitioner to be a rude shock, having been guided in their training and policies by this Court's holding in Garner as to when deadly physical

force may be used legitimately. We urge this Court to grant the District of Columbia's petition for certiorari to clarify the correct standard to be applied in assessing municipal liability in this difficult area.

The Court of Appeals' apparent willingness to base municipal liability on expert testimony that the police should meet certain novel criteria before using deadly force is particularly disturbing. Notably, the suggestions that a police officer may not use deadly force until a weapon is seen in the suspect's hand, and that an attempt must be made to disarm the suspect by other means, conflict with police practice as we know it. This case appears to be another instance of a phenomenon that municipalities have experienced repeatedly during the decade since this Court handed down the Monell decision: the plaintiffs' Bar can obtain expert witnesses to testify to a wide

range of additional measures that, in their opinion, defendants should have implemented. See, e.g., Dodd v. City of Norwich, supra, 827 F.2d 1. While the use of deadly force in fleeing felon situations is strongly discouraged, we do not believe that the preconditions to the use of such force imposed in the case at bar are either legally required or desirable.

The subject officer, though under a mistake of fact, had reasonable cause to believe that respondent was a fleeing felon armed with a deadly weapon, that the suspect was about to use deadly physical force on the officer or a third person, and that reasonable means to apprehend the suspect and terminate the felony other than by deadly force were not available. Neither the New York City Police Department, nor any other police department with which we are familiar, would preclude the use of

deadly force in this situation until a weapon was sighted in the suspect's hand. To impose such a rule would cause a delay with potentially fatal consequences to the officer and innocent third persons.[2]

It cannot be denied that unarmed physical force is an appropriate course of conduct in certain situations. For this reason, patrol officers are routinely trained in means to disarm suspects by less than deadly force. Hand-to-hand confrontations can place police officers in extremely compromising positions, however, as their

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[2]The magnitude of the problem faced by officers on patrol may be gleaned from the most recent statistics available: during the calendar year 1987, there were 233 firearm discharge incidents involving 286 New York City police officers. In addition, during this same period, one New York City police officer was shot and killed, and five officers were shot and wounded, without returning fire. See also Sherrod v. Berry, supra, 856 F.2d at 807, n. 2.

guns and other weapons are readily exposed to the suspect's grasp in the course of such struggles.

In consideration of the dangers that hand-to-hand struggles can present, New York City police officers are not instructed to subdue supects by entering into this kind of confrontation unless they are sure that their strength and skills are adequate to defeat their adversaries decisively. Even with optimum physical conditioning and training, use of less than deadly force to subdue a suspect reasonably believed to be armed will not be a possible or prudent course to follow under certain circumstances like those presented in the instant case. Such an assessment is made perforce by the individual officer at the time of an incident.

A recent en banc decision from the Court of Appeals for the Seventh Circuit is illustrative of the scrutiny applied to a

police officer's split-second decision to use deadly force. In Sherrod v. Berry, supra, 856 F.2d 802, an officer who believed that he was apprehending an armed robber fired his revolver at the suspect when the officer observed him quickly moving his hand into his coat, as if reaching for a weapon. The fact that the suspect was ultimately found to be unarmed was held by the Seventh Circuit to be irrelevant to the jury's measurement of the objective reasonableness of the officer's use of deadly force, for which the case was remanded.

In contrast, in this case, the District of Columbia Circuit permitted respondent to prevail on the theory that police officers should be trained not to shoot a suspected felon believed to be reaching for a weapon until the officer sees a weapon in the suspect's hand. The instant petition offers this Court an excellent opportunity to

resolve whether such a standard is Constitutionally-mandated. The City of New York and police departments across the country need to know whether their training and policies on the use of deadly force must be revised to take the standard imposed below into account.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 88-810

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DISTRICT OF COLUMBIA,
Petitioner,
v.
DONALD R. PARKER, *et ux.*,
Respondents.

Brief *Amicus Curiae* In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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II. THERE IS IN THE UNITED STATES NO GENERALLY ACCEPTED POLICE CUSTOM, PRACTICE, OR POLICY THAT REQUIRES POLICE OFFICERS TO ATTEMPT TO DISARM VIOLENT CRIME SUSPECTS THROUGH THE USE OF PHYSICAL FORCE 7

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INTERESTS OF AMICI CURIAE

The Five Concerned Washington, D.C., Criminal Justice Scholars include:

David E. Aaronson, J.D., Ph.D., is a professor in the Washington College of Law and in the Department of Justice, Law and Society of the American University of Washington, D.C. Professor Aaronson has published extensively in the areas of police discretion and public policy. Professor Aaronson is widely known in the academic and law enforcement communities as an advocate of police restraint.

Richard R. Bennett, Ph.D., is a professor in the Department of Justice, Law and Society of The American University, Washington, D.C. Professor Bennett, a former law enforcement officer, has conducted and published extensive research on police training and is widely known in the academic and law enforcement communities as an advocate of police restraint.

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James J. Fyfe, Ph.D., is professor and chair of the Department of Justice, Law and Society of The American University, Washington D.C. Professor Fyfe, a former police officer, has conducted and published extensive research on violence between police and citizens and

police use of deadly force. Professor Fyfe drafted the Police Foundation *amici* brief in *Tennessee v. Garner,* 471 U.S. 1 (1985). Fyfe is a commissioner of the Commission on Accreditation for Law Enforcement Agencies and is widely known in the academic and law enforcement communities as an advocate of police restraint.

Arnold S. Trebach, J.D., Ph.D., is a professor in the Department of Justice, Law and Society of the American University, director of the Drug Policy Foundation, Washington, D.C. Professor Trebach is a former attorney with the United States Civil Rights Commission, and is widely known in the academic and law enforcement communities as an advocate of police restraint.

The *Amici* respectfully offer this brief in support of the petitioner. This petition raises issues of considerable public importance, the resolution of which will directly affect the safety of law enforcement officers and citizens throughout the country. In addition, there is a significant public interest in protecting public officials and law enforcement officers from unwarranted monetary liability under 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

After extensive research and consideration, *amici* have concluded that the standards for police use of deadly force advocated by Respondents and approved by the United States Court of Appeals for the District of Columbia Circuit are inconsistent with the fundamental police responsibility to protect life. Unless reversed by this Court, these standards will unnecessarily and unreasonably endanger citizens and police officers; dissuade police officers from being *appropriately* aggressive in their efforts to prevent and detect crime; and place unworkable burdens on police administrators.

ARGUMENT

Amici believe that all police experience and all available evidence indicate that the public's interest in the safety of citizens and police officers, and in effective law enforcement is damaged by the decision of the Court of Appeals.

I. THERE IS IN THE UNITED STATES NO GENERALLY ACCEPTED POLICE CUSTOM, PRACTICE, OR POLICY THAT REQUIRES POLICE OFFICERS TO REFRAIN FROM USING DEADLY FORCE UNTIL THEY ACTUALLY SEE WEAPONS IN THE HANDS OF ADVERSARIES.

Through long and painful experience and through extensive study, *amici* know well the dangers that confront police officers, and the difficulty of balancing citizens' safety and dignity with officers' need to protect the public and themselves. *Amici* know also that the great variability of potentially violent circumstances confronted by police officers in the field makes it impossible to prescribe detailed instructions by which officers might resolve every situation they encounter. Instead of undertaking the fruitless process of attempting to devise hard-and-fast rules for all situations, reasonable and competent police administrators throughout the United States have attempted to provide officers with general guidelines and strategies, and to train officers to adapt and apply these to a variety of fast-breaking situations. Through training and policy, reasonable and competent police administrators throughout the United States attempt to limit officers' discretion, but they recognize that it is not possible to eliminate such

discretion, and that it is far more practical to channel officers' discretion in directions that are consistent with fundamental police goals and responsibilities.

As reasonable and competent police administrators recognize, the primary police goal and responsibility is the protection of life. This responsibility applies to the lives of innocent citizens, suspects, potential adversaries, and police officers. As reasonable and competent police administrators also recognize, therefore, the acid test of whether police officers have appropriately exercised their discretion involves no artificial bright-line criteria, but involves instead the questions of whether officers have acted in an objectively reasonable manner that was consistent with their primary responsibility to protect life. Indeed, this test was the very reason for the law enforcement community's *amici* brief in *Garner*. In that case, as reasonable and competent police administrators recognized, state laws and administrative policies authorized a police officer to act in a manner inconsistent with his primary responsibility to protect life by shooting Edward Eugene Garner.

If the Court of Appeals' ruling in this case is followed elsewhere, police administrators will be required to promulgate policies and rules that will require officers to act in ways inconsistent with their responsibility to protect their own lives and the lives of innocent citizens. The ultimate consequence of such policies and rules will be unnecessary bloodshed and a reduction in the law enforcement effectiveness of the police.

When police are required to actually see weapons before resorting to deadly force, they will be proscribed from shooting at kidnappers who hold innocent citizens

at the points of announced, but unseen, guns. They will be required to refrain from shooting until bank robbers and airline hijackers who claim that their suitcases contain bombs actually prove their claims.

Under this standard, the police shooting of the man who, several years ago, held much of this Nation's capital hostage by threatening to blow up the Washington Monument with a truckload of explosives would be unjustifiable on grounds that the officer who eventually killed him had not actually seen a weapon. When police are required to actually see weapons in adversaries' hands before firing, many will die because their sightings will have come too late to allow for defensive responses: by the time a police officer sees a weapon in the hand of an adversary, the officer is literally only an instant from imminent death or grievous injury.

When police are required to refrain from shooting until they actually see weapons in adversaries' hands, they will also refrain from acting appropriately in circumstances in which they are likely to encounter armed suspects. This bright-line requirement that police officers actually see weapons in the hands of adversaries before resorting to deadly force is foolhardy and unprecedented. The historic test of the justifiability of officers' use of deadly force in defense of life is whether officers held objectively reasonable fear for their lives or for the lives of third parties when they fired their weapons. As illustrated above, such fear frequently exists even though officers do not actually see weapons. Unless this Court formally acknowledges that this fear may exist even though officers do not actually see weapons, police officers, citizens, and law enforcement effectiveness will suffer, and violent criminals will be instructed that they

may immunize themselves from defensive use of police deadly force by concealing their guns in their pockets or in paper bags.

II. THERE IS IN THE UNITED STATES NO GENERALLY ACCEPTED POLICE CUSTOM, PRACTICE, OR POLICY THAT REQUIRES POLICE OFFICERS TO ATTEMPT TO DISARM VIOLENT CRIME SUSPECTS THROUGH THE USE OF PHYSICAL FORCE.

The core of the police role, Professor Egon Bittner has observed in a classic work on the police, is a monopoly on the legitimate use of coercive force. E. Bittner, *The Functions of the Police in Modern Society* (1970). When they are on our streets, police officers represent society and its interests and, in practice, their monopoly on legitimate use of force dictates that police officers have an obligation not to lose encounters with potential adversaries. This obligation, as *amici* well recognize, must be exercised humanely and with great restraint.

This obligation not to lose is also the reason that police are authorized to escalate the force they employ to defend themselves or others to whatever degree is reasonably necessary. Despite extensive study and experience, *amici* are aware of no American jurisdiction in which police officers are required or expected to use unarmed defensive measures or martial arts techniques to overcome and disarm adversaries reasonably believed to be armed, dangerous, and to present imminent threats of death or grievous physical injury to officers or other persons. These are the circumstances that prevailed in this case, when Officer Hayes shot Donald R. Parker:

Parker, the subject of an arrest warrant for armed robbery, had fled the police, reasonably appeared to be forcibly kidnapping an innocent woman, had ignored Officer Hayes's commands to freeze, had overcome Officer Hayes's efforts to subdue him, and was reaching for his waistband at the time he was shot by Officer Hayes. *Amici* can conceive of no American jurisdiction in which Hayes would have been required to attempt to disarm Parker by engaging in hand-to-hand combat.

This is so because, regardless of the physical condition or training of any police officer, such a determination would place upon police officers the impossible burden of being capable of physically overpowering and disarming anybody they might happen to encounter in the course of their duties. No degree of training or physical fitness conditioning can ensure such an outcome, and no reasonable and competent American police administrator expects his or her officers to be martial arts experts capable of disarming anybody on the street without sometimes being compelled to resort to deadly force. If this were not the case, American police officers would have little need for firearms.

CONCLUSION

The standards for use of deadly force ratified by the Court of Appeals in this matter have nothing to do with the reality of policing in the United States. Unless they are overturned by this Court, the ability of the police to protect the lives and dignity of citizens, suspects, and themselves, and to prevent and detect crime will be greatly diminished.

Respectfully submitted,

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No. 88-810

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DISTRICT OF COLUMBIA,
Petitioner,
v.
DONALD R. PARKER, *et ux.*,
Respondents.

Brief *Amicus Curiae* In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICI
Five Concerned Washington, D.C. Criminal Justice Scholars

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II. THERE IS IN THE UNITED STATES NO GENERALLY ACCEPTED POLICE CUSTOM, PRACTICE, OR POLICY THAT REQUIRES POLICE OFFICERS TO ATTEMPT TO DISARM VIOLENT CRIME SUSPECTS THROUGH THE USE OF PHYSICAL FORCE 7

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INTERESTS OF AMICI CURIAE

The Five Concerned Washington, D.C., Criminal Justice Scholars include:

David E. Aaronson, J.D., Ph.D., is a professor in the Washington College of Law and in the Department of Justice, Law and Society of the American University of Washington, D.C. Professor Aaronson has published extensively in the areas of police discretion and public policy. Professor Aaronson is widely known in the academic and law enforcement communities as an advocate of police restraint.

Richard R. Bennett, Ph.D., is a professor in the Department of Justice, Law and Society of The American University, Washington, D.C. Professor Bennett, a former law enforcement officer, has conducted and published extensive research on police training and is widely known in the academic and law enforcement communities as an advocate of police restraint.

Gerald Caplan, J.D., is a professor in the National Law Center of George Washington University, Washington, D.C. Professor Caplan is a former General Counsel of the Metropolitan Police Department of Washington, D.C, former director of the National Institute of Justice, and was director of the Philadelphia Task Force. Professor Caplan is widely known in the academic and the law enforcement communities as an advocate of police restraint.

James J. Fyfe, Ph.D., is professor and chair of the Department of Justice, Law and Society of The American University, Washington D.C. Professor Fyfe, a former police officer, has conducted and published extensive research on violence between police and citizens and

police use of deadly force. Professor Fyfe drafted the Police Foundation *amici* brief in *Tennessee v. Garner,* 471 U.S. 1 (1985). Fyfe is a commissioner of the Commission on Accreditation for Law Enforcement Agencies and is widely known in the academic and law enforcement communities as an advocate of police restraint.

Arnold S. Trebach, J.D., Ph.D., is a professor in the Department of Justice, Law and Society of the American University, director of the Drug Policy Foundation, Washington, D.C. Professor Trebach is a former attorney with the United States Civil Rights Commission, and is widely known in the academic and law enforcement communities as an advocate of police restraint.

The *Amici* respectfully offer this brief in support of the petitioner. This petition raises issues of considerable public importance, the resolution of which will directly affect the safety of law enforcement officers and citizens throughout the country. In addition, there is a significant public interest in protecting public officials and law enforcement officers from unwarranted monetary liability under 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

After extensive research and consideration, *amici* have concluded that the standards for police use of deadly force advocated by Respondents and approved by the United States Court of Appeals for the District of Columbia Circuit are inconsistent with the fundamental police responsibility to protect life. Unless reversed by this Court, these standards will unnecessarily and unreasonably endanger citizens and police officers; dissuade police officers from being *appropriately* aggressive in their efforts to prevent and detect crime; and place unworkable burdens on police administrators.

ARGUMENT

Amici believe that all police experience and all available evidence indicate that the public's interest in the safety of citizens and police officers, and in effective law enforcement is damaged by the decision of the Court of Appeals.

I. THERE IS IN THE UNITED STATES NO GENERALLY ACCEPTED POLICE CUSTOM, PRACTICE, OR POLICY THAT REQUIRES POLICE OFFICERS TO REFRAIN FROM USING DEADLY FORCE UNTIL THEY ACTUALLY SEE WEAPONS IN THE HANDS OF ADVERSARIES.

Through long and painful experience and through extensive study, *amici* know well the dangers that confront police officers, and the difficulty of balancing citizens' safety and dignity with officers' need to protect the public and themselves. *Amici* know also that the great variability of potentially violent circumstances confronted by police officers in the field makes it impossible to prescribe detailed instructions by which officers might resolve every situation they encounter. Instead of undertaking the fruitless process of attempting to devise hard-and-fast rules for all situations, reasonable and competent police administrators throughout the United States have attempted to provide officers with general guidelines and strategies, and to train officers to adapt and apply these to a variety of fast-breaking situations. Through training and policy, reasonable and competent police administrators throughout the United States attempt to limit officers' discretion, but they recognize that it is not possible to eliminate such

discretion, and that it is far more practical to channel officers' discretion in directions that are consistent with fundamental police goals and responsibilities.

As reasonable and competent police administrators recognize, the primary police goal and responsibility is the protection of life. This responsibility applies to the lives of innocent citizens, suspects, potential adversaries, and police officers. As reasonable and competent police administrators also recognize, therefore, the acid test of whether police officers have appropriately exercised their discretion involves no artificial bright-line criteria, but involves instead the questions of whether officers have acted in an objectively reasonable manner that was consistent with their primary responsibility to protect life. Indeed, this test was the very reason for the law enforcement community's *amici* brief in *Garner*. In that case, as reasonable and competent police administrators recognized, state laws and administrative policies authorized a police officer to act in a manner inconsistent with his primary responsibility to protect life by shooting Edward Eugene Garner.

If the Court of Appeals' ruling in this case is followed elsewhere, police administrators will be required to promulgate policies and rules that will require officers to act in ways inconsistent with their responsibility to protect their own lives and the lives of innocent citizens. The ultimate consequence of such policies and rules will be unnecessary bloodshed and a reduction in the law enforcement effectiveness of the police.

When police are required to actually see weapons before resorting to deadly force, they will be proscribed from shooting at kidnappers who hold innocent citizens

at the points of announced, but unseen, guns. They will be required to refrain from shooting until bank robbers and airline hijackers who claim that their suitcases contain bombs actually prove their claims.

Under this standard, the police shooting of the man who, several years ago, held much of this Nation's capital hostage by threatening to blow up the Washington Monument with a truckload of explosives would be unjustifiable on grounds that the officer who eventually killed him had not actually seen a weapon. When police are required to actually see weapons in adversaries' hands before firing, many will die because their sightings will have come too late to allow for defensive responses: by the time a police officer sees a weapon in the hand of an adversary, the officer is literally only an instant from imminent death or grievous injury.

When police are required to refrain from shooting until they actually see weapons in adversaries' hands, they will also refrain from acting appropriately in circumstances in which they are likely to encounter armed suspects. This bright-line requirement that police officers actually see weapons in the hands of adversaries before resorting to deadly force is foolhardy and unprecedented. The historic test of the justifiability of officers' use of deadly force in defense of life is whether officers held objectively reasonable fear for their lives or for the lives of third parties when they fired their weapons. As illustrated above, such fear frequently exists even though officers do not actually see weapons. Unless this Court formally acknowledges that this fear may exist even though officers do not actually see weapons, police officers, citizens, and law enforcement effectiveness will suffer, and violent criminals will be instructed that they

may immunize themselves from defensive use of police deadly force by concealing their guns in their pockets or in paper bags.

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